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THE FEDERAL DEATH PENALTY ACT OF 1989

October 20 (legislative day, September 18), 1989.—Ordered to be printed

Mr. Biden, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 32]

The Committee on the Judiciary, to which was referred the bill (S. 32), having considered the same, reports the bill, as amended, without recommendation thereon.

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I. Purpose

The purpose of the bill is to establish procedures for the implementation of a Federal death penalty. The procedures set forth in the bill would apply to 23 Federal criminal statutes. Of these, 16 are offenses for which Congress previously authorized death as the

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maximum sentence, 6 are offenses for which the bill raises the maximum sentence to death, and 1 is a new Federal offense.

II. LEGISLATIVE HISTORY

S. 32 was introduced by Senator Thurmond on January 25, 1989. As introduced, the bill was substantially similar to Federal death penalty bills introduced by Senator Thurmond in earlier Congresses including S. 1765 in the 98th Congress (which passed the Senate by a vote of 63 to 32) and S. 239 in the 99th Congress (which was reported favorably by the Judiciary Committee by a vote of 12 to 6). See S. Rep. No. 98-251, 98th Cong., 1st Sess. (1983); S. Rep. No. 99-282, 99th Cong., 2d Sess. (1986). Pursuant to a unanimous consent agreement on July 20, 1989, S. 32 was revised and reprinted in a "star print" edition. See Congessional Record, daily edition, July 21, 1989, at S8537. All further references to S. 32 in this report are to the star print.

The unanimous consent agreement also required the Judiciary Committee to hold hearings on the bill, to vote to report the bill (with or without further amendments) by October 17, 1989, and to file its report on the bill, as amended, by October 20, 1989.

The committee held a series of three hearings on the bill, each of which included testimony from witnesses in support of and in opposition to the legislation. The first hearing on September 19, 1989, included testimony from the Edward S.G. Dennis, Acting Deputy Attorney General, on behalf of the Department of Justice in favor of S. 32, and on the differences between that bill and the Bush administration's death penalty bill, S. 1225. Other witnesses at the first hearing discussed a variety of death penalty issues. The witnesses included Senator Strom Thurmond; Michael McCann, district attorney, Milwaukee, WI; Ronald E. Hampton, National Black Police Association; James C. Anders, solicitor for the State of South Carolina, Columbia, SC; Wanda Summers, Pawley's Island, SC; Robert B. Kliesmet, International Union of Police Association; C. Roland Vaughn III, International Association of Chiefs of Police; Michael Radelet, University of Florida; and Jonathan E. Gradess, New York Defenders Association.

The second hearing on September 27, 1989, focused on several of the specific provisions of S. 32 and on the impact of the legislation on Native Americans. The witnesses at this hearing were Steve Kinnard, Jones, Day, Reavis & Pogue, Atlanta, GA; Michael Mello, Vermont Law School; Nancy McKerrow, assistant public defender, Columbia, MO; Jim Ellis, American Association on Mental Retardation; Tova Indritz, Federal public defender, Albuquerque, NM; Tom Tso, chief justice, Navajo Nation; Edward Lone Fight, Three Affiliated Tribes, Ft. Berthold Reservation, ND; Faith Roessel, Native American Rights Fund; Paul Kamenar, Washington Legal Foundation; Paul Cassell, assistant U.S. attorney, Alexandria, VA; and Sterling Epps, Federal Law Enforcement Officers' Association.

The third hearing on October 2, 1989, was devoted to the provisions of the Racial Justice Act, a bill introduced by Senator Kennedy and later added by the committee as section 7 of S. 32. The witnesses were Althea Simmons, NAACP; Joseph E. Lowrey, Southern Christian Leadership; Julius L. Chambers, NAACP Legal Defense

Fund; David C. Baldus, University of Iowa College of Law; Ronald J. Tabak, American Bar Association; Edward S.G. Dennis, Acting Deputy Attorney General; William B. Hill, Deputy Attorney General, State of Georgia; Joseph L. Katz, Georgia State University; Paul D. Kamenar, Washington Legal Foundation.

As required by the unanimous consent agreement, the Judiciary Committee met in executive session on October 17, 1989, and after adopting seven amendments, voted to report the bill without recommendation.

III. DISCUSSION

Although various provisions of the United States Code now authorize the imposition of the sentence of death,[1] these sentences have been unenforceable because they fail to incorporate a set of procedures to govern the determination whether a sentence of death is warranted in a particular case. As the Supreme Court first held in *Furman* v. *Georgia*, 408 U.S. 238 (1972), and has elaborated in greater detail in numerous cases since that decision, such procedures are necessary to guard against arbitrary and irrational application of the death penalty.

In 1988, Congress enacted a death penalty provision for certain drug-related murders that incorporated procedures absent in existing Federal death penalty laws. These procedures were included in the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, and are codified at 21 U.S.C. 848(e)-(r). As put before the committee, S. 32 did not include many of the procedural provisions enacted in the drug bill.

During the course of committee consideration of S. 32, however, six amendments adopted by the committee made the provisions of S. 32 somewhat closer to the procedures enacted in 1988. The committee also rejected one other amendment and one amendment in the second degree. These amendments were the following:

1. A Biden amendment (No. 1) to require a jury instruction to protect against a verdict based on race or prejudice.

The amendment was approved by voice vote.

2. A Biden amendment (No. 2) to prohibit execution of persons under the age of 18 years.

The vote on the amendment was as follows:

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[1] The statutes currently authorizing the death penalty that would be affected by this bill are the following. With three exceptions, the death penalty applies only where death results. The exceptions are for treason, espionage, and attempted assassination of the President where the attempt comes dangerously close to success:

18 U.S.C. 32—Destruction of Aircraft.
18 U.S.C. 33—Destruction of Motor Vehicle.
18 U.S.C. 115—Murder of Family Member of Fed. Official.
18 U.S.C. 351—Murder of Member of Congress, Cabinet or Supreme Court.
18 U.S.C. 794—Espionage.
18 U.S.C. 844(d)—Transporting Explosives with Intent to Kill.
18 U.S.C. 844(f)—Arson (Federal property).
18 U.S.C. 844(i)—Arson (property in interstate commerce).
18 U.S.C. 1111—Murder in Territorial Jurisd. of U.S.
18 U.S.C. 1114—Murder of Federal Official.
18 U.S.C. 1716—Mailing Injurious Articles.
18 U.S.C. 1751—Assassination of the President.
18 U.S.C. 2113—Wrecking a Train.
18 U.S.C. 2381—Bank Robbery.
18 U.S.C. 2381—Treason.
49 U.S.C. 1473—Aircraft Hijacking.

YEAS—8	NAYS—5
Biden	Thurmond
Kennedy	Hatch
Metzenbaum	Simpson
DeConcini	Grassley
Leahy	Humphrey
Simon	
Kohl	
Specter	

3. A Biden amendment (No. 3) to prohibit categorically the execution of mentally retarded persons.

The amendment was approved by voice vote after a Thurmond amendment in the second degree was rejected. The Thurmond amendment would have prohibited the execution of mentally retarded persons who are lacking in the capacity to appreciate the wrongfulness of their actions.

The vote on the Thurmond second degree amendment was as follows:

YEAS—5	NAYS—7
Thurmond	Biden
Hatch	Kennedy
Simpson	Metzenbaum
Grassley	Leahy
Humphrey	Simon
	Kohl
	Specter

4. A Biden amendment (No. 4) to require that the jury unanimously agree on each aggravating factor found to exist.

The amendment was approved by voice vote.

5. A Biden amendment (No. 5) to require that the jury be instructed that it is not required to return a death sentence.

The amendment was approved by voice vote.

6. A Biden amendment (No. 6) to require the appointment of qualified counsel for indigent defendants in death cases.

The committee rejected the amendment by the following vote:

YEAS—6	NAYS—6
Biden	Thurmond
Kennedy	Hatch
Metzenbaum	Simpson
Leahy	Grassley
Simon	Specter
Kohl	Humphrey

7. A Biden amendment (No. 7) to add seven mitigating factors to the list of factors to be considered by the jury.

The vote on the amendment was as follows:

YEAS—8	NAYS—5
Biden	Thurmond
Kennedy	Hatch
Metzenbaum	Simpson
DeConcini	Grassley
Leahy	Humphrey

Simon
Kohl
Specter

Despite the acceptance of these amendments, some differences between S. 32 and the 1988 drug bill remain.

In addition to enacting procedures for the implementation of the death penalty for the 16 Federal offenses for which that penalty is already authorized, S. 32 authorizes death as a penalty for 6 additional offenses for which life imprisonment is now the maximum penalty.[2] It also creates a new Federal offense that is punishable by death.[3]

Finally, the committee adopted a Kennedy amendment that would enact the Racial Justice Act of 1989. The act would prohibit imposition or execution of a death sentence under color of State or Federal law if that sentence furthers a "racially discriminatory pattern."

The vote on the amendment was as follows:

YEAS—7	NAYS—6
Biden	DeConcini
Kennedy	Thurmond
Metzenbaum	Hatch
Leahy	Simpson
Simon	Grassley
Kohl	Humphrey
Specter	

IV. Vote of the Committee

On October 17, 1989, the Committee on the Judiciary, a quorum being present, voted not to report S. 32 favorably. The vote was as follows:

YEAS—7	NAYS—7
DeConcini	Biden
Heflin	Kennedy
Thurmond	Metzenbaum
Hatch	Leahy
Simpson	Simon
Specter	Kohl
Humphrey	Grassley

Subsequently, by voice vote, the committee voted to report the bill without recommendation.

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[2] These six offenses are the following. In each case, the death penalty would apply only where death results:
18 U.S.C. 1091—Genocide.
18 U.S.C. 1116—Murder of Foreign Official.
18 U.S.C. 1201—Kidnapping.
18 U.S.C. 1203—Hostage Taking.
18 U.S.C. 1958—Murder-for-Hire.
18 U.S.C. 1959—Murder in Aid of Racketeering.

[3] The new offense, to be codified at 18 U.S.C. 1118, relates to murders committed by prisoners serving life sentences in Federal prisons. This incorporates the provisions of a bill introduced by Senator Biden in 1984 (S. 2327, 98th Cong., 2nd Session).

V. TEXT OF S. 32, AS REPORTED

[101st Cong., 1st Sess.]

A BILL To establish constitutional procedures for the imposition of the sentence of death, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Death Penalty Act of 1989".

SEC. 2. CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF THE SENTENCE OF DEATH.

(a) IN GENERAL.—Part II of title 18 of the United States Code is amended by adding the following new chapter after chapter 227:

"CHAPTER 228—DEATH SENTENCE

"Sec.
"3591. Sentence of death.
"3592. Factors to be considered in determining whether a sentence of death is justified.
"3593. Special hearing to determine whether a sentence of death is justified.
"3594. Imposition of a sentence of death.
"3595. Review of a sentence of death.
"3596. Implementation of a sentence of death.
"3597. Use of State facilities.

"§ 3591. Sentence of death

"A defendant who has been found guilty of—

"(a) an offense described in section 794 or section 2381 of this title;

"(b) an offense described in section 1751(c) of this title, if the offense, as determined beyond a reasonable doubt at the hearing under section 3593, constitutes an attempt to kill the President of the United States and results in bodily injury to the President or comes dangerously close to causing the death of the President; or

"(c) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

"(1) intentionally killed the victim;

"(2) intentionally inflicted serious bodily injury that resulted in the death of the victim;

"(3) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

"(4) intentionally and specifically engaged in an act, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified; provided that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

"§ 3592. Factors to be considered in determining whether a sentence of death is justified

"(a) MITIGATING FACTORS.—In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

"(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

"(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

"(3) The defendant is punishable as a principal (as defined in section 2 of title 18 of the United States Code) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

"(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

"(5) The defendant was youthful, although not under the age of 18.

"(6) The defendant did not have a significant prior criminal record.

"(7) The defendant committed the offense under severe mental or emotional disturbance.

"(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

"(9) The victim consented to the criminal conduct that resulted in the victim's death.

"(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

"(b) AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON.—In determining whether a sentence of death is justified for an offense described in section 3591(a), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist

"(1) The defendant has previously been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"(c) AGGRAVATING FACTORS FOR HOMICIDE AND FOR ATTEMPTED MURDER OF THE PRESIDENT.—In determining whether a sentence of death is justified for an offense described in section 3591 (b) or (c), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

"(1) the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property in interstate commerce by explosives), section 1118 (prisoners serving life term), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i) or (n)) (aircraft piracy);

"(2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

"(3) the defendant has previously been convicted of two or more Federal or State offenses, punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person;

"(4) the defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

"(8) the defendant committed the offense after planning and premeditation to cause the death of a person or commit an act of terrorism;

"(9) the defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance;

"(10) the victim was particularly vulnerable due to old age, youth, or infirmity;

"(11) the defendant had previously been convicted of violating title II or title III of the Controlled Substances Act for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise;

"(12) the defendant violated section 408(c) of the Controlled Substances Act to the extent that the conduct described in section 408(c) of such Act was a violation of section 405 of such Act; or

"(13) the defendant committed the offense against—

"(A) the President of the United States, the President-elect, the Vice President, the Vice-President-elect, the Vice-President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(C) a foreign official listed in section 1116(b)(3)(A) of this title, if he is in the United States on official business; or

"(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

"(i) while he is engaged in the performance of his official duties;

"(ii) because of the performance of his official duties; or

"(iii) because of his status as a public servant.

For purposes of this subparagraph, a 'law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"§ 3593. Special hearing to determine whether a sentence of death is justified

"(a) NOTICE BY THE GOVERNMENT.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice—

"(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

"(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(b) HEARING BEFORE A COURT OR JURY.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

"(1) before the jury that determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury that determined the defendant's guilt was discharged for good cause; or

"(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

"(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

"(d) RETURN OF SPECIAL FINDING.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by one or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

"(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH.—If, in the case of—

"(1) an offense described in section 3591(a), an aggravating factor required to be considered under section 3592(b) is found to exist; or

"(2) an offense described in section 3591 (b) or (c), an aggravating factor required to be considered under section 3592(c) is found to exist;

the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor of factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether a sentence of death shall be imposed rather than some other lesser sentence. The jury or the court, if there is no jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence, and the jury shall be so instructed.

"(f) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

"§ 3594. Imposition of a sentence of death

"Upon a finding under section 3593(e) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under section 3593(e) that a sentence of death is not justified, or under section 3593(d) that no aggravating factor required to be found exists, the court shall impose any sentence other than death that is authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without parole.

"§ 3595. Review of a sentence of death

"(a) Appeal.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

"(b) Review.—The court of appeals shall review the entire record in the case, including—

"(1) the evidence submitted during the trial;

"(2) the information submitted during the sentencing hearing;

"(3) the procedures employed in the sentencing hearing; and

"(4) the special findings returned under section 3593(d).

"(c) Decision and Disposition.—

"(1) If the court of appeals determines that—

"(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

"(B) the information supports the special finding of the existence of an aggravating factor required to be considered under section 3592;

it shall affirm the sentence.

"(2) In any other case, the court of appeals shall remand the case for reconsideration under section 3593.

"(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"§ 3596. Implementation of a sentence of death

"(a) A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designated another State, the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

"(b) A sentence of death shall not be carried out upon a woman while she is pregnant.

"(c) A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

"(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

"(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability convey such information to counsel or to the court.

"§ 3597. Use of State facilities

"(a) IN GENERAL.—A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purposes, and shall pay the costs thereof in an amount approved by the Attorney General.

"(b) EXCUSE OF AN EMPLOYEE ON MORAL OR RELIGIOUS GROUNDS.—No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term 'participation in executions' includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.".

(b) REPEAL.—Sections 3566 and 3567 fo title 18, United States Code, are hereby repealed.

(c) AMENDMENTS TO CHAPTER ANALYSIS.—The chapter analysis of part II of title 18, United States Code, is amended by adding the following new item after the item relating to chapter 227:

"228. Death sentence .... 3591".

(2) The section analysis of chapter 227 of title 18, United States Code, is amended by amending the items relating to sections 3566 and 3567 to read as follows:

"3566. Repealed.
"3567. Repealed."

SEC. 3. CONFORMING CHANGES IN TITLE 18.

(a) AIRCRAFT AND MOTOR VEHICLES.—Section 34 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the section.

(b) ESPIONAGE.—Section 794(a) of title 18, United States Code, is amended by striking the period at the end of the section and inserting ", except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warnings systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.".

(c) Explosive Materials.—(1) Section 844(d) of title 18, United States Code, is amended by striking "as provided in section 34 of this title".

(2) Section 844(f) of title 18, United States Code, is amended by striking "as provided in section 34 of this title".

(3) Section 844(i) of title 18, United States Code, is amended by striking the words "as provided in section 34 of this title."

(d) Murder.—(1) The second undesignated paragraph of section 1111(b) of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;".

(2) Section 1116(a) of title 18, United States Code, is amended by striking "any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and".

(e) Kidnapping.—Section 1201(a) of title 18, United States Code, is amended by inserting after "or for life" the following: "and, if the death of any person results, shall be punished by death or life imprisonment".

(f) Nonmailable Injurious Articles.—The last paragraph of section 1716 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the paragraph.

(g) Presidential Assassinations.—Subsection (c) of section 1751 of title 18, United States Code, is amended to read as follows:

"(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by deat or imprisonment for any term of years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.".

(h) Wrecking Trains.—The second to the last undesignated paragraph of section 1992 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the section.

(i) Bank Robbery.—Section 2113(e) of title 18, United States Code, is amended by striking "or punished by death if the verdict of the jury shall so direct" and inserting "or if death results shall be punished by death or life imprisonment".

(j) Hostage Taking.—Section 1203(a) of title 18, United States Code, is amended by inserting after "or for life" the following: "and, if the death of any person results, shall be punished by death or life imprisonment".

(k) Racketeering.—(1) Section 1952A(a) of title 18, United States Code, is amended by striking "and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both" and inserting "and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both".

(2) Section 1952B(a)(1) of title 18, United States Code, is amended to read as follows:

"(1) for murder, by death or life imprisonment, or a fine of not more than $250,000, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine of not more than $250,000, or both;".

(l) GENOCIDE.—Section 1091(b)(1) of title 18, United States Code, is amended by striking "a fine of not more than $1,000,000 or imprisonment for life," and inserting ", where deaths results, a fine of not more than $1,000,000, or imprisonment for life or a sentence of death,".

SEC. 4. CONFORMING AMENDMENT TO FEDERAL AVIATION ACT OF 1954.

Section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), is amended by striking subsection (c).

SEC. 5. APPLICABILITY TO UNIFORM CODE OF MILITARY JUSTICE.

The provisions of chapter 228 of title 18, United States Code, as added by this Act, shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801).

SEC. 6. MURDER BY A FEDERAL PRISONER.

(a) IN GENERAL.—Chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 1118. Murder by a Federal prisoner

"(a) Whoever, while confined in a Federal correctional institution under a sentence for a term of life imprisonment, murders another shall be punished by death or by life imprisonment without the possibility of parole.

"(b) For the purposes of this section—

"(1) the term 'Federal correctional institution' means any Federal prison, Federal correctional facility, Federal community program center, or Federal half-way house;

"(2) the term 'term of life imprisonment' means a sentence for the term of national life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum of life, or an unexecuted sentence of death; and

"(3) the term 'murders' means committing first degree or second degree murder as defined by section 1111 of this title.".

(b) AMENDMENT TO CHAPTER ANALYSIS.—The chapter analysis for chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following:

"1118. Murder by a Federal prisoner.".

SEC. 7. RACIAL JUSTICE ACT OF 1989.

(a) SHORT TITLE.—This section may be cited as the "Racial Justice Act of 1989".

(b) FINDINGS.—The Congress finds that—

(1) section 5 of the fourteenth amendment of the United States Constitution calls upon Congress to enforce the Constitution's promise of equality under law;

(2) equality under law is tested most profoundly by whether a legal system tolerates race playing a role in the determination of whether and when to administer the ultimate penalty of death;

(3) the death penalty is being administered in a pattern that evidences a significant risk that the race of the defendant, or the race of the victim against whom the crime was committed,

influences the likelihood that the defendant will be sentenced to death;

(4) the Constitution's guarantee of equal justice for all is jeopardized when the death penalty is imposed in a pattern in which the likelihood of a death sentence is affected by the race of the perpetrator or of the victim;

(5) the United States Supreme Court has concluded that the Federal judiciary is institutionally unable to eliminate this jeopardy to equal justice in the absence of proof that a legislature, prosecutor, judge, or jury acted with racially invidious and discriminatory motives in the case of a particular defendant;

(6) the interest in ensuring equal justice under law may be harmed, not only by decisions motivated by explicit racial bias, but also by government rules, policies, and practices that operate to reinforce the subordinate status to which racial minorities were relegated in our society;

(7) the institutional need of courts to identify invidiously motivated perpetrators is not shared by Congress, which is empowered by section 5 of the fourteenth amendment to take system-wide, preventive measures not only to eliminate adjudicated instances of official race discrimination but also to eradicate wide-scale patterns and practices that entail an intolerable danger that persons of different races would be treated differently; and

(8) the persistent racial problems pervading the implementation of the death penalty in many parts of this Nation require the Government of the United States to counteract the lingering effects of racial prejudice in order to enforce the constitutional guarantee of equal justice for all Americans.

(c) AMENDMENT TO TITLE 28.—

(1) PROCEDURE.—Part VI of title 28, United States Code, is amended by adding at the end thereof the following new chapter:

"CHAPTER 177—RACIALLY DISCRIMINATORY CAPITAL SENTENCING

"Sec.
"2921. Definitions.
"2922. Prohibition on the imposition or execution of the dealth penalty in a racially discriminatory pattern.
"2923. Data on death penalty cases.
"2924. Enforcement of the chapter.
"2925. Construction of chapter.

"§ 2921. Definitions

"For purposes of the chapter—

"(1) the term 'a racially discriminatory pattern' means a situation in which sentences of death are imposed more frequently—

"(A) upon persons of one race than upon persons of another race; or

"(B) as punishment for crimes against persons of one race than as punishment for crimes against persons of another race,

and the greater frequency is not explained by pertinent nonracial circumstances;

"(2) the term 'death-eligible crime' means a crime for which death is a punishment that is authorized by law to be imposed under any circumstances upon a conviction of that crime;

"(3) the term 'case of death-eligible crime' means a case in which the complaint, indictment, information, or any other initial or subsequent charging paper charges any person with a death-eligible crime; and

"(4) the term 'Federal or State entity' means any State, the District of Columbia, the United States, any territory thereof, and any subdivision or authority of any of these entities that is empowered to provide by law that death be imposed as punishment for crime.

"§ 2922. Prohibition on the imposition or execution of the death penalty in a racially discriminatory pattern

"(a) Prohibition.—It is unlawful to impose or execute sentences of death under color of State or Federal law in a racially discriminatory pattern. No person shall be put to death in the execution of a sentence imposed pursuant to any law if that person's death sentence furthers a racially discriminatory pattern.

"(b) Establishment of a Pattern.—To establish that a racially discriminatory pattern exists for purposes of this chapter—

"(1) ordinary methods of statistical proof shall suffice; and

"(2) it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution.

"(c) Prima Facie Showing.—(1) To establish a prima facie showing of a racially discriminatory pattern for purposes of this chapter, it shall suffice that death sentences are being imposed or executed—

"(A) upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death-eligible crimes; or

"(B) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against thom death-eligible crimes have been committed.

"(2) To rebut a prima facie showing of a racially discriminatory pattern, a State of Federal entity must establish by clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern.

"§ 2923. Data on death penalty cases

"(a) Designation of Agency.—Any State or Federal entity that provides by law for death to be imposed as a punishment for any crime shall designate a central agency to collect and maintain pertinent data on the charging, disposition, and sentencing patterns for all cases of dealth-eligible crimes.

"(b) RESPONSIBILITIES OF CENTRAL AGENCY.—Each central agency designated pursuant to subsection (a) shall—

"(1) affirmatively monitor compliance with this chapter by local officials and agencies;

"(2) devise and distribute to every local official or agency responsible for the investigation or prosecution of dealth-eligible crimes a standard form to collect pertinent data;

"(3) maintain all standard forms, compile and index all information contained in the forms, and make both the forms and the compiled information publicly available;

"(4) maintain a centralized, alphabetically indexed file of all police and investigative reports transmitted to it by local officials or agencies in every case of death-eligible crime; and

"(5) allow access to its file of police and investigative reports to the counsel of record for any person charge with any death-eligible crime or sentenced to death who has made or intends to make a claim under section 2922 and it may also allow access to this file to other persons.

"(c) RESPONSIBILITY OF LOCAL OFFICIAL.—(1) Each local official responsible for the investigation or prosecution of death-eligible crimes shall—

"(A) complete the standard form developed pursuant to subsection (b)(2) on every case of death-eligible crime; and

"(B) transmit the standard form to the central agency no later than 3 months after the disposition of each such case whether that disposition is by dismissal of charges, reduction of charges, acceptance of a plea of guilty to the death-eligible crime or to another crime, acquittal, conviction, or any decision not to proceed with prosecution.

"(2) In addition to the standard form, the local official or agency shall transmit to the central agency one copy of all police and investigate reports made in connection with each case of death-eligible crime.

"(d) PERTINENT DATA.—The pertinent data required in the standard form shall be designated by the central agency but shall include, at a minimum, the following information:

"(1) pertinent demographic information on all persons charged with the crime and all victims (including race, sex, age, and national origin);

"(2) information on the principal features of the crime;

"(3) information on the aggravating and mitigating factors of the crime, including the background and charater of every person charged with the crime; and

"(4) a narrative summary of the crime.

"§ 2924. Enforcement of the Chapter

"(a) ACTION UNDER SECTIONS 2241, 2254, OR 2255 OF THIS TITLE.—In any action brought in a court of the United States within the jurisdiction conferred by sections 2241, 2254, or 2255, in which any person raises a claim under section 2922—

"(1) the court shall appoint counsel for any such person who is financially unable to retain counsel; and

"(2) the court shall furnish investigative, expert or other services necessary for the adequate development of the claim to any such person who if financially unable to obtain such services.

"(b) DETERMINATION BY A STATE COURT.—Notwithstanding section 2254, no determination on the merits of a factual issue made by a State court pertinent to any claim under section 2922 shall be presumed to be correct unless—

"(1) the State is in compliance with section 2923;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim which were substantially equivalent to those provided by subsection (a); and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criterion specified in section 2254.

"§ 2925. Construction of chapter

"Nothing contained in this chapter shall be construed to affect in one way or the other the lawfulness of any sentence of death that does not violate sectoin 2922.".

(2) AMENDMENT TO TABLE OF CHAPTERS.—The table of chapters of part VI of title 28, United States Code, is amended by adding at the end thereof the following new item:

"177. Racially Discriminatory Capital Sentencing.. 2921.".

(d) ACTIONS PRIOR TO THE DATE OF ENACTMENT.—No person shall be barred from raising any claim under section 2922 of title 28, United States Code, as added by this section, on the ground of having failed to raise or to prosecute the same or a similar claim prior to enactment of the section nor by reason of any adjudication rendered prior to its enactment.

VI. SECTION-BY-SECTION ANALYSIS

Section 1 contains the short title of the bill, the "Federal Death Penalty Act of 1989".

Section 2 creates a new chapter 228 in title 18 of the United States Code. The new chapter contains the procedures necessary for implementation of the death penalty in Federal cases. Each of the sections of the new chapter are described as follows:

Section 3591 sets out the offenses for which the death penalty may be imposed if, following a sentencing hearing conducted in accordance with the remaining sections of chapter 228, it is determined that the imposition of death is justified. The offenses are those set forth in the margin, as well as the new offense enacted by section 6 of the bill, but they do not include the drug-related murder offenses covered by the separate death penalty provisions of the Anti-Drug Abuse Act of 1988. See 38 U.S.C. 848(e)–(r).

Subsection (c) sets forth certain threshold requirements regarding the defendant's state of mind in homicide cases. If the jury does not find that at least one of these provisions describes the defendant's state of mind at the time of the offense, the death penalty may not be imposed. The provisions are that the defendant—

(1) intentionally killed the victim;

(2) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(3) intentionally participated in an act, contemplating that a life would be taken or that lethal force would be used, and the victim died as a direct result of the act; or

(4) intentionally participated in an act, knowing that it created a grave risk of death, with reckless disregard for human life, and the victim died as a direct result of the act.

Finally section 3591 prohibits the execution of a person who was less than 18 years of age at the time of the offense.[4]

Section 3592 sets forth the statutory mitigating and aggravating factors to be considered by the jury or judge in determining whether a sentence of deach is justified upon conviction of a crime for which the sentence is authorized. The section also allows, consistent with Supreme Court decisions, for the consideration of any other aggravating or mitigating factor not listed which might affect the sentence. See *Skipper* v. *South Carolina*, 476 U.S. 1 (1986); *Lockett* v. *Ohio,* 438 U.S. 586 (1978); *Barclay* v. *Florida,* 463 U.S. 939 (1938); *Zant* v. *Stephens,* 426 U.S. 862 (1983).

Subsection (a) sets forth 10 mitigating factors that must be considered.[5] These factors are identical to those enacted by Congress in the Anti-Drug Abuse Act of 1988 for drug-related murders. The subsection further states that the jury or judge shall consider any other aspect of the defendant's character, record, or the circumstances of the offense that the defendant may offer in mitigation. This reflects the Supreme Court's ruling that no limitation may be placed on the defendant's introducing evidence of mitigating facts. See *Lockett* v. *Ohio,* supra.

Subsection (b) sets forth the aggravating factors for espionage and treason.

Subsection (c) sets forth the aggravating factors for the homicide offenses and for the attempted murder of the President. Most of these factors are self-explanatory. Factor (5) regarding cases in which the defendant "committed the offense in an especially heinous, cruel and depraved manner" is intended to apply to cases where the defendant tortured or physically abused the victim before the victim died. Factor (8) regarding offenses involving "planning and premeditation" is intended to apply to cases where the level of planning was unusually careful and thus goes beyond what is necessary to satisfy the premeditation requirement of first degree murder. Factor (1) regarding cases in which "the victim was particularly vulnerable due to old age, or infirmity" is intended to apply to cases where the defendant knew of the particular infirmity.

Section 3593 sets out the precedure for a special hearing to determine whether a sentence of death is justified. At the conclusion of the hearing, the jury (except in those unusual circumstances where the sentencing hearing is before the judge alone) may, in its discretion, return a binding recommendation of the death penalty as opposed to some lesser punishment, if all of the procedures set forth in section 3593 are satisfied.

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[4] This was the substance of Biden amendment No. 2 that was adopted by the committee.

[5] S. 32, as introduced, contained 3 mitigating factors. Seven additional factors were inserted pursuant to Biden amendment No. 7 that was adopted by the committee.

Subsection 3593(a) provides that if the attorney for the government intends to seek the death penalty for one of the offenses for which the death penalty is authorized, he or she must file with the court and serve on the defendant a notice to that effect, and set forth the aggravating factors (including any not specifically listed in section 3592) the Government proposes to introduce at the hearing. The notice must be filed and served on the defendant at a reasonable time before trial or the accepting of a guilty plea, or at the time thereafter as the court may permit upon a showing of good cause. This provision is intended to ensure that the defendant has adequate notice so that he or she can prepare for the post-conviction sentencing hearing and can conduct an appropriate *voire dire* of the prospective jurors.

Subsection 3593(b) provides that if the attorney for the Government has filed the notice required by subsection (a), and if the defendant is found guilty, a sentencing hearing shall be conducted by the judge who presided at a trial or accepted the guilty plea, or by another judge if the first one is unavailable. The hearing is to be conducted before the jury that determined the defendant's guilt, except that a jury may be impaneled for the purpose of the sentencing hearing in a case in which the defendant was convicted on a trial to the court or on a plea of guilty, in a case in which the original jury was discharged for good cause, or in a case where reconsideration of the sentence is necessary. This subsection also provides that the defendant may move that the sentencing hearing be conducted before the court alone, but that the attorney for the Government must concur.

Subsection 3593(c) provides that no presentence report is to be prepared, inasmuch as the issue at the hearing is the existence of aggravating or mitigating factors and whether the imposition of the death sentence is justified.

This subsection also deals with the proof of aggravating and mitigating factors. Any information relevant to the sentence may be presented regardless of its admissibility under the Federal Rules of Evidence governing criminal trials, although evidence may be excluded if the court finds that its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. Evidence of mitigating factors my be introduced without limitation to the list of mitigating factors set out in section 3592.

The burden of establishing an aggravating factor is on the government, and the standard of proof for such a factor is beyond a reasonable doubt. The defendant has the burden of establishing any mitigating factor, but this burden is satisfied if the defendant proves such a factor by a preponderance of the evidence.

Subsection 3593(d) deals with the return of special findings required in the sentencing hearings. It provides that the jury, or if there is no jury, the court, must consider all of the information received at the sentencing hearing and return a special finding identifying each aggravating factor that it has found. The finding with respect to each aggravating factor found by the jury must be unanimous with respect to that factor. It is not sufficient for some of the jurors to agree that one aggravating factor exists while the remaining jurors agree that another factor exists.[6] If no aggravating factor is found, the death penalty cannot be imposed and the court must impose some other sentence authorized by statute.

With respect to mitigating factors, subsection (d) reflects the recent holding of the Supreme Court in *Mills* v. *Maryland*, 108 S. Ct. 1860 (1988), that individual jurors may not be precluded from considering mitigating evidence regardless of the number of jurors who agree on a particular factor. Consequently, subsection (d) provides that a finding with respect to a mitigating factor may be made by any member of the jury, and any juror who is persuaded by a preponderance of the evidence that a particular mitigating factor exists may consider such a factor established. That juror (even if he or she is the only one who believes the evidence and has concluded that such a factor has been established) may then weigh that evidence against any aggravating factors that have been found unanimously in deciding, under subsection 3593(e), whether to return a binding recommendation for death.

Subsection 3593(e) provides that if one or more of the aggravating factors specified in section 3592 is found to exist, the jury, or the court if there is no jury, must then consider whether the aggravating factor or factors that it has found outweigh all mitigating factors found by the individual jurors, or, if no mitigating factor has been found, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Subsection (e) also provides that "the jury or the court, if there is no jury, regardless of its finding with respect to aggravating and mitigating factors, is never required to impose a death sentence, and the jury shall be so instructed." [7] This is a "safety valve" provision intended to guarantee that the jurors understand that notwithstanding the various rules and procedures outlined in the statute, the recommendation of death must be, in the end, a personal decision, not the result of a mechanical process. The provision thus ensures that each juror is told that no matter what the result of the various findings and balancing tests may be, if that juror believes that a death sentence should not be recommended, he or she is free to vote against that recommendation.

Subsection 3593(f) is designed as a special precaution against discrimination by the jury against the defendant on the basis of the defendant's or the victim's race, color, national origin, religious beliefs, or gender.[8] It provides that in a sentencing hearing in which the death penalty is sought, the jury shall be specifically instructed that it must not consider these factors and that the jury is not to make its recommendation for a sentence of death unless it would recommend such a sentence no matter what the race, color, national origin, religious beliefs, or sex of the defendant or any victim. Moreover, the jury must return to the court a certificate signed by each juror stating that consideration of these factors was not involved in his or her individual decision, and that he or she would have made the same recommendation as to the sentence no matter what these particular characteristics of the defendant or victim might be.

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[6] This was the substance of Biden amendment No. 4 as adopted by the committee.

[7] This was the substance of Biden amendment No. 5 that was adopted by the committee.

[8] This was the substance of Biden amendment No. 1 that was adopted by the committee.

Section 3594 provides that the jury's recommendation of a death sentence is binding on the court. If the jury does not recommend a death sentence, however, the court may impose any other sentence, including a sentence of life in prison. Since parole in the Federal system was abolished by the Sentencing Reform Act of 1984, all life sentences are sentences of life imprisonment without parole.

Section 3595 sets out the rules applicable to appeals from the imposition of the death sentence. Subsection (a) provides that a sentence of death shall be subject to review by the court of appeals upon an appeal of the sentence by the defendant.

Subsection 3593(b) provides that the court of appeals must consider the entire record including the evidence submitted at trial, the information submitted during the sentencing hearing, the procedures employed at the sentencing hearing, and the special findings returned at the sentencing hearing as to the existence of the aggravating factors.

Subsection 3596(c) states that the court of appeals must affirm the sentence if it finds that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the evidence and information support the special findings of the existence of an aggravating factor or factors. In all other cases, the court of appeals must remand the case for reconsideration under section 3593 or for imposition of another authorized sentence, as appropriate. The court of appeals must state in writing the reasons for its disposition of an appeal of a sentence of death.

Section 3596 is concerned with the implementation of a sentence of death. Subsection (a) provides that a person sentenced to death shall be committed to the custody of the Attorney General pending completion of the appeal and review process. When the sentence is to be carried out, the custody of the person would be given to a U.S. marshal who would then supervise the execution in accordance with the law of the State in which the sentence is imposed. If that State has no death penalty, the court would designate another State that does have such a penalty, and the execution would be carried out in the manner prescribed in that State.

Subsection 3596(b) states that a sentence of death shall not be carried out upon a woman while she is pregnant.

Subsection 3596(c) states that a sentence of death shall not be carried out upon a mentally retarded person or a person who, as a result of mental disability—

> (1) cannot understand the nature of the pending proceedings, what such person was tried for, or the reasons or nature of the punishment; or
>
> (2) lacks the capacity to recognize or understand facts that would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.[9]

This provision is taken verbatim from the death penalty provisions of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 848(l)).

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[9] This was the substance of Biden amendment No. 3 that was adopted by the committee.

Subsection 3597(a) authorizes the U.S. marshal charged with carrying out the sentence of death to use State facilities and to pay for them. Subsection (b) provides that no employee of any State department of corrections or of the Federal Bureau of Prisons may be required to attend or participate in any execution carried out under this act if such participation is contrary to the moral or religious convictions of the employee.

Sections 3 and 4 of the bill make minor and technical changes to the substantive criminal statutes to which the death penalty procedures set forth in the bill would apply. Such changes are intended to conform the language in those statutes with these procedures. Section 3 also authorized death as the maximum sentence for the six offenses set forth in the margin for which the death penalty is not currently authorized.[10]

Section 5 provides that the capital punishment procedures of the new chapter 228 shall not apply to prosecutions under the Uniform Code of Military Justice since the military code has its own set of death penalty procedures and provisions. This provision is not intended to imply anything, one way or the other, about the sufficiency or constitutionality of those procedures.

Section 6 creates a new offense, punishable by death, involving murder committed by a Federal prisoner serving a life sentence.

Section 7 contains the provisions of the Racial Justice Act [11] which would prohibit imposition or execution of a death sentence under color of State or Federal law if that sentence furthers a "racially discriminatory pattern."

Section 7(a) establishes the short title of the section as the "Racial Justice Act of 1989."

Section 7(b) contains Congress' findings that the death penalty is being administered in a pattern that evidences a significant risk that the race of the defendant, and the race of the victim against whom the crime was committed, influences the likelihood that the defendant will be sentenced to death; that the Constitution's guarantee of equal justice under law is jeopardized when the death penalty is imposed in such a racially discriminatory pattern; that the persistent racial problems pervading the implementation of the death penalty in many parts of the Nation require the Congress to act to eliminate such problems and enforce the constitutional guarantee of equal protection under the law.

Section 7(c) amends part VI of title 28, United States Code, as follows:

Section 2921 sets forth the definitions of the terms used in the Act.

A "racially discriminatory pattern" is a situation in which sentences of death are imposed more frequently upon persons of one race than upon persons of another race or as punishment for crimes against persons of one race than as punishment for crimes against persons of another race, and the greater frequency is not explained by pertinent nonracial circumstances. Such a situation exists, for example, where black defendants receive the death penalty at a rate that is higher than the rate at which white defendants receive the death penalty, if the greater frequency is not explained by pertinent nonracial circumstances, such as the presence or absence of aggravating or mitigating circumstances.

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[10] See notes 1 and 2, supra. The offense of assassination of the President (18 U.S.C. 1751) is listed among those for which the penalty of death is currently authorized. Current law, however, authorizes such punishment only where the President is killed. The bill would extend the death penalty to attempted assassinations that come dangerously close to success.

[11] This was the substance of the Kennedy amendment that was adopted by the committee.

A "death-eligible crime" is a crime for which death is a punishment that is authorized by law to be imposed under any circumstances upon a conviction of that crime. Thus, for example, if a State's law authorizes the death penalty to be imposed for first-degree murder, then it is a "death-eligible crime" within the meaning of the act.

A case of a death-eligible crime is a case in which the complaint, indictment, information or any other initial or subsequent charging document charges any person with a death-eligible crime.

A Federal or State entity refers to any State, the District of Columbia, the United States, any territory thereof, and any subdivision or other authority that is empowered to provide by law that death may be imposed as punishment for crime.

Section 2922 declares it unlawful to impose or execute death sentences under state or federal law in a racially discriminatory pattern, and would prohibit imposition or execution of a death sentence under color of State or Federal law if that sentence furthers such a pattern. It provides that a racially discriminatory pattern may be established by any form of admissible evidence, including ordinary methods of statistical proof otherwise deemed admissible in court proceedings. So, for example, the kinds of statistical evidence accepted by the Supreme Court in discriminatory venire-selection cases, and title VII cases, may establish such a pattern. *See, e.g., Castaneda* v. *Partida,* 430 U.S. 482 (1977); *Bazemore* v. *Friday,* 106 S. Ct. 3000 (1986). Proof of discriminatory motive on the part of any individual or institution need not be shown.

A *prima facie* showing of a racially discriminatory pattern may be established by showing that death sentences are being imposed or executed:

> (1) upon persons of one race with a frequency that is disproportionate to their representation among persons arrested for, charged with, or convicted of, death-eligible crimes; or
>
> (2) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against who death-eligible crimes have been committed.

Thus, if ordinary methods of admissible statistical evidence established that 15 percent of all defendants charged with killing white persons received the death penalty, and only 1 percent of all defendants charged with killing black persons received the death penalty, such a showing would establish a *prima facie* case under the act.

To rebut a *prima facie* showing of a racially discriminatory pattern, the State or Federal entity seeking to impose the death penalty must establish by clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern. The *prima facie* case example referred to above could be rebutted by clear and convincing evidence that identifiable and pertinent nonracial factors, such as the presence or absence of aggravating or mitigating factors, persuasively explained the pattern.

Section 2923 requires any State or Federal entity that provides by law for the death penalty to be imposed for any crime to designate an agency to collect and maintain pertinent data on charging, disposition and sentencing patterns for all cases of death eligible crimes. Pertinent data includes pertinent demographic information on all persons charged with the crime and all victims of the crime; information on the principal features of the crime; and information on the aggravating and mitigating factors of the crime, including the background and character of every person charged with the crime, and a narrative summary of the crime.

These central agencies would devise and distribute to local prosecutorial and investigative agencies a standard form to collect pertinent data; maintain the forms, compile and index the information contained thereon, and make the forms and the information publicly available; maintain a central file of police and investigative reports transmitted to it by local agencies on every case of death-eligible crime; and allow access to these reports by counsel of record for persons for the purpose of permitting a claim to be made under the act. Local agencies would be responsible for completing the standard form for each case of a death-eligible crime and transmitting it and copies of all police and investigative reports to the central agency no later than 3 months after the disposition of the case.

Section 2924 provides that the act may be enforced in proceedings under sections 2241, 2254, and 2255 of title 28, United States Code. In any such proceeding where a person raises a claim under the act, the court is required to appoint counsel for any person who is financially unable to retain qualified counsel and the court shall cause to be furnished investigative, expert or other services necessary for the adequate development of the claim to any person who is financially unable to obtain such services. No factual determination made by a State court pertinent to a claim under the act shall be presumed to be correct if the State is not in compliance with 28 U.S.C. 2923, did not afford indigent parties counsel and investigative, expert and other services necessary for the adequate development of the claim.

Section 2925 makes it clear that the act does not affect in one way or the other the lawfulness of any sentence of death that does not violate the act.

Section 7(d) provides that no person shall be barred from raising a claim under the act on the ground of having failed to raise or to prosecute the same or a similar claim before enactment of the act or by reason of any adjudication rendered before its enactment.

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington DC, October 20, 1989.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 32, the Federal Death Penalty Act of 1989, as ordered reported by the Senate Committee on the Judiciary, October 18, 1989.

CBO estimates that enacting S. 32 would not have a significant effect on Federal spending. The bill would establish procedures for the imposition of the death sentence in Federal court. Imposition of the death sentence could affect spending in several Federal programs. Some Federal activities could face increased costs in death penalty cases while others could have lower costs. In any event, CBO does not expect that the number of death penalty cases would be large enough to generate a significant effect on Federal spending in any particular fiscal year.

S. 32 would also place certain reporting requirements on State and local governments. CBO does not expect that these requirements would be substantially different from existing ones; therefore, we expect that there would be no significant additional costs to state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

IX. ADDITIONAL VIEWS OF CHAIRMAN BIDEN

I. INTRODUCTION

S. 32 imposes the death penalty for 22 crimes under Federal law, and for all murders occurring on Federal lands. In the debate over this bill, some confusion about its scope and significance arose. Consequently, before setting out my views on S. 32, it is important to separate the rhetoric about S. 32 from the reality of the bill before us.

S. 32 does not impose the death penalty for drug kingpins, drug dealers, or any drug-related offenses. Neither the sponsors of S. 32 or the Bush administration have pending before the committee any proposal to expand the "death penalty for drug kingpin" legislation approved by the Congress last year. The Bush administration itself, in testimony before the committee, conceded that S. 32 has no direct relation to drug-related murders at all.

Indeed, it is difficult to see how this bill relates to any part of the current crime epidemic plaguing America. Over the past 3 years, there have been fewer than 10 cases where the Federal Government could have won the death penalty under S. 32 for crimes committed off of Federal lands—about three a year. Even if one accepts the proposition that the death penalty deters crime, S. 32 hardly offers a substantial answer to the crime wave that desperately demands our attention.

Tools to fight the crime onslaught to exist. Congress has passed a variety of tough anti-crime and anti-drug legislation over the past decade. Virtually all of these measures have won broad bipartisan support. A case in point is the "death for drug kingpin" legislation that the Congress passed last year. That law provides the death penalty for major drug dealers who murder law enforcement officers, or who commit murder in the course of distributing illegal drugs. This law has not been invoked in a single case to date.

It is against this background that S. 32's relevance and importance to our current crime problems must be measured. Whereas the unused drug kingpin law may apply to thousands of cases annually, S. 32 would apply in only a handful of cases each year. Thus, in my view, S. 32 has virtually nothing to do with the real crime threat that plagues America's streets, schools, and neighborhoods.

II. WHY I VOTED AGAINST S. 32

Of course, simply because a bill is oversold does not mean that it is inadvisable. Very little legislation would pass the Senate if we voted down every bill whose promise exceeded its reality. I did not vote against S. 32 simply because some of the rhetoric surrounding it suggests that it is something that it is not.

Nor was my opposition to S. 32 based on some general moral objection to the death penalty. Indeed, just the opposite. I disagree with those who believe that government executions are morally wrong or offensive; I have no moral opposition to the death penalty, especially in particularly heinous cases.

However, the execution of innocent people is morally repugnant. I know of no moral system or set of values that defends the taking of innocent lives; unfortunately, the history of the death penalty in America contains several such incidents. As a result, the only capital punishment system that can be defended, in my view, is one that takes adequate steps to insure that these horrors do not occur in the future.

As originally drafted, S. 32 fell far, far short of this standard. Indeed, as considered by our committee, S. 32 lacked seven of the modest procedural safeguards the Congress adopted in last year's "death penalty for drug kingpins" legislation. The idea that drug dealers who kill police officers should receive greater safeguards at their trials than those who maliciously wreck trains is odd, to say the least.

Moreover, a broad consensus supports these safeguards: five of these seven measures are included in the Bush administration's death penalty bill, S. 1225.

Consequently, when the committee considered S. 32, I offered seven amendments to restore this bare minimum level of procedural safeguards—a bare minimum that the Congress approved and President Reagan signed last year. The committee accepted six of these provisions, but rejected a crucial one on a tie vote: the imposition of standards governing the qualifications of counsel in capital cases.

These standards would have required that lawyers appointed to handle capital cases under S. 32 must:

> For the trial level, (1) have been admitted to the bar of the District court for five years, and (2) have three years experience trying felony cases; and
>
> For the appellate level, (1) have been admitted to the bar of the Court of Appeals for five years, and (2) have three years experience in handling appeals of felony cases.

I cannot imagine that there is any person in America who would be willing to go to trial in any serious criminal case—let alone a capital case—with a lawyer who lacked such minimal experience. The American Bar Association, for example, has recommended far more elaborate and exacting criteria as a minimum for capital cases attorneys.

Yet the committee rejected these modest qualifications when I proposed adding them to S. 32. Without them, I cannot support this bill. Given that the principal reason I have opposed some death penalty bills in the past is the risk that an innocent person may be executed, I cannot support the idea of putting someone on trial for his life, with the prospect that the lawyer defending that person will be handling his or her very first criminal case.

In addition, there were three other procedural safeguards that I intended to offer in committee, but met with opposition from supporters of S. 32. I had to forego debate and votes on these amendments, in order to permit final committee consideration of the bill.

(Had I not withheld, it is possible that the committee would not have completed its work on S. 32—in this event, the bill sent to the Senate would have lacked *any* of the procedural safeguards the committee approved.)

These three amendments would have:

Removed S. 32's ban on the application of the Federal Rules of Evidence to capital sentencing hearings. Without this amendment, capital punishment hearings will be the only proceedings conducted before a jury in Federal court where the Rules of Evidence will not apply.

Permitted full appellate review of death sentences. Again, S. 32 singles out death sentences—among all other criminal punishments—and further limits appellate review of these sentences. A person who receives a $1 fine would receive more extensive appellate review of his punishment than a person who receives a death sentence under S. 32. This oddity, too, must be corrected.

Allowed judges to set aside death sentences rendered by juries. Such a judicial override provision exists in several States that have the death penalty, such as Florida. Once again, for all other types of crimes tried in our courts, it is the judge who has the final say about the sentence—this safeguard, like the others, should not be removed in capital cases.

These three additional protections are needed to insure that death sentences are not imposed with less safeguards than other criminal sentences. For this is the ultimate irony of S. 32: in many respects, it takes away many safeguards that otherwise exist in our system to prevent unjust convictions in run-of-the-mill criminal cases. It is irrational to have a death penalty law that deprives capital defendants of some procedural safeguards that we give petty thieves. Yet that is precisely what S. 32 does.

In light of these deficiencies in S. 32, I voted against the bill in committee. A capital punishment scheme that lacks such fundamental procedural safeguards poses too high a risk of executing innocent people to gain my support.

III. Application to Native Americans

An added cause of concern about S. 32 is the unequal way in which it treats Native American Indians. I had intended to offer an amendment in committee to rectify this inequity but was, as I have explained above, prevented from doing so.

S. 32 provides for the death penalty for 22 very specific (and fortunately rare) Federal crimes, plus all murders committed on Federal lands. About two-thirds of all of the murders that would be covered by S. 32 fall into this second category. And, according to data provided to the committee, about three quarters of all of these murders are crimes committed on tribal lands populated by Native American Indians.

Simply put: Native American Indians—less than 1 percent of our population—would be the subject of more than 50 percent of the death sentences that S. 32 imposes. This is a disparity that cannot be justified.

My amendment, supported by the chairman of the Select Committee on Indian Affairs (Sen. Inouye), would have removed crimes committed on Federal lands from the scope of S. 32. When this bill comes before the full Senate, I hope that this amendment, or some other suitable proposal, will remedy the inequity the bill now contains.

IV. CONCLUSION

In conclusion, I want to reiterate my position on the death penalty, and how this position relates to S. 32.

To repeat, I have no moral objection to the death penalty. I do, however, have an abiding concern that some death penalty laws result in the execution of innocent people. We have seen this happen in the past, when innocent men and women have been sentenced and/or put to death.

Therefore, I have always pursued two objectives when death penalty legislation is considered in the Senate:

> I have worked to put adequate safeguards in death penalty bills to prevent the execution of innocent people. Where sufficient safeguards are in place, I will vote for death penalty proposals.
>
> In the absence of adequate safeguards in a death penalty bill, I have supported a substitute penalty of mandatory life imprisonment without the possibility of parole or early release.

I should also note that there are two instances in which I have supported legislation that includes death penalty provisions, even where adequate safeguards are lacking:

> First, in the case of a narrow class of very special crimes. One example is punishing life-term prisoners who commit murder. In these cases, the risk of error is relatively low, given the circumstances of the offense. In addition, the extraordinary sanction of the death penalty is the only possible punishment that can deter these crimes.
>
> Second, where the death penalty is included as part of a larger bill with greatly worthwhile objectives—and where at least some minimum safeguards exist. My support for last year's Drug Bill, which included the "death penalty for drug kingpins" discussed above, falls into this category.

S. 32 neither contains adequate safeguards, nor does it fall into one of these two special categories. It expands the number of crimes for which the death penalty is imposed under Federal law, and lacks even the minimal safeguards included in last year's Drug Bill. In light of this, I opposed S. 32 in committee.

X. ADDITIONAL VIEWS OF SENATORS KENNEDY, BIDEN, METZENBAUM, LEAHY, SIMON, AND KOHL ON THE RACIAL JUSTICE ACT

I. Introduction

The Racial Justice Act of 1989 is a legislative response to the overwhelming evidence that racial considerations improperly affect capital sentencing decisions in many jurisdictions in this country. Studies analyzing death penalty cases in State after State conclude that the death penalty is administered in a pattern evidencing a significant risk that the race of the defendant, or the race of the victim against whom the crime was committed, influences the likelihood that the death penalty will be imposed. In *McCleskey* v. *Kemp,* 481 U.S. 279, 319 (1987), the Supreme Court recognized that the responsibility for addressing this problem falls to the legislative branch.

The Racial Justice Act would make a remedy available to persons who are sentenced to death in furtherance of a racially discriminatory sentencing pattern. Under the act, a petitioner will be permitted to offer evidence, including ordinary admissible methods of statistical proof, to demonstrate that there is a significant likelihood that race played a role in the decisionmaking process that resulted in the death sentence. If the petitioner can establish that his or her sentence furthers a racially discriminatory sentencing pattern, the burden will shift to the State to demonstrate by clear and convincing evidence that identifiable nonracial factors explain the racially disparate patterns. The act will thus prohibit the application of the death penalty in circumstances where imposition of a death sentence furthers a racially discriminatory pattern, and that pattern cannot be explained to be the product of factors other than racial discrimination.

II. Background and Need for the Racial Justice Act

A. BACKGROUND

In *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Supreme Court held that the death penalty could not be constitutionally imposed under sentencing laws that did not include adequate guidelines to govern the sentencing decision. Giving judges and juries such high levels of discretion, reasoned the Court, rendered the application of the death penalty arbitrary and capricious in violation of the eighth amendment's prohibition on cruel and unusual punishment.

Four years later, when faced with a death penalty statute that provided for a bifurcated trial, increased guidance for judges and juries, and automatic review to the State's supreme court, the Court found the statute constitutional. *Gregg* v. *Georgia,* 428 U.S. 153 (1972). The Court found the provisions of the statute satisfied its concerns regarding the arbitrary and capricious application of the death penalty.

B. WIDESPREAD EVIDENCE OF RACIAL DISCRIMINATION IN CAPITAL SENTENCING

Testimony provided to the committee during its hearings, as well as numerous academic studies, indicated the existence of a widespread pattern of discrimination based on the race of the defendant ("race-of-defendant" discrimination) and on the race of the victim against whom the crime was committed ("race-of-victim" discrimination) in the application of the death penalty.

Professor David C. Baldus, of the University of Iowa College of Law, testified that empirical studies conducted in several States document a pattern of race-of-victim discrimination. Professor Baldus's best known studies analyzed over 2,400 homicide cases in Georgia between 1973 and 1979. From official State records, the Baldus researchers collected data about more than 500 factors in each case, such as the characteristics of the defendant and the victim, the circumstances of the crime, the strength of the evidence, and a range of mitigating and aggravating factors in each case. Using sophisticated statistical techniques including multiple regression analysis, the studies took account of the effects of up to 230 nonracial sentencing factors.

Their conclusions are striking: When the characteristics of the crime and the defendant were controlled for, those who killed whites were 4.3 times more likely to receive the death penalty than killers of blacks. The import of the data was well summarized in Justice Brennan's dissent in the *McCleskey* case:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced with death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it would be more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 out of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey, 20 out of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narra-

> tive line: there was a significant chance that race would play a prominent role in determining if he lived or died. 481 U.S. at 321 (Brennan, J., dissenting) (citations omitted).

Commenting on McCleskey's sentence itself, Justice Brennan wrote that—

> [t]he Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black. Id. at 325 (emphasis in original).

In other words, no nonracial factor explained the discriminatory pattern. In the middle range of cases (i.e. those potential death penalty cases that are neither the most heinous or the least heinous), where the decision whether or not to seek or impose the death penalty was closest and decisionmakers thus have the most discretion, the Baldus study found that the death sentence rate in white-victim cases was twice as high as in black-victim cases.

Professor Baldus' study indicated that patterns of discrimination that were based on the race of the defendant also existed, although to a lesser extent. This type of discrimination was particularly prevalent in certain kinds of cases, such as white-victim cases that were highly aggravated.

The pattern of racial considerations apparent in capital sentencing is repeated in jurisdiction after jurisdiction around the country.

—In Florida, a study published in the Stanford Law Review found that defendants convicted of killing whites were eight times more likely to receive a death sentence than those convicted of murdering blacks. Gross & Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization," 37 Stan. L. Rev. 27 (1984).

—In Illinois, a study found that killers of whites were six times as likely to receive a death sentence as killers of blacks. Id.

—In Maryland, defendants convicted of murdering whites received the death sentence eight times more frequently than killers of blacks, according to one study. Henderson & Taylor, "Killers of Dallas Blacks Escape the Death Penalty," Dallas Times-Herald, Nov. 17, 1985, at 1, col. 1.

—In Texas, a 1985 study found that killers of whites were over four times more likely to receive death sentences than killers of blacks. Id.

This pattern is repeated in jurisdictions throughout the United States. Baldus, Pulaski & Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty," 15 Stet. L. Rev. 353 (1986). During his testimony, Professor Baldus proffered to the committee 28 studies of capital sentencing decisions in jurisdictions throughout the United States, all of which found evidence that racial considerations play a role in capital sentencing decisions. Testimony by the NAACP Legal Defense and education Fund's Director—Counsel, Mr. Julius L. Chambers, revealed that the above results have been echoed in more than a dozen studies conducted by reputable researches throughout the United States. Mr. Chambers also noted that no state has demonstrated that these results were the product of chance or of legitimate sentencing considerations.

The American Bar Association's representative, Mr. Ronald Tabak, likewise testified that—

> numerous studies indicate a widespread pattern of racial discrimination in the imposition of capital punishment. In State after State, a defendant is far more likely to receive the death penalty for a particular capital murder if his victim is white than if his victim is black.

In addition to citing the Baldus study's conclusions, the ABA's testimony also cited a nationwide study revealing that the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black in 32 States where the death penalty has been imposed. Henderson & Taylor, Killers of Dallas Blacks Escape the Death Penalty," Dallas Times-Herald, Nov. 17, 1985, at 1, col. 1. Moreover, Samuel Gross and Robert Mauro's extensive statistical study of homicides from 1975 to 1980, which, like the Baldus study, was adjusted to eliminate the effect of nonracial variables, found significant disparities in capital sentencing according to the victim's race in Georgia, Florida, Illinois, Oklahoma, North Carolina and Mississippi. Gross & Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization," 37 Stan. L. Rev. 27 (1984).

C. THE MC CLESKEY DECISION

In *McCleskey* v. *Kemp,* 481 U.S. 279 (1987) the Supreme Court considered for the first time a challenge to a death sentence based on evidence of a radically discriminatory pattern in capital sentencing, when McCleskey placed the Baldus study before the Court. The Court assumed the validity of the Baldus study, id. at 291, n. 7, but found that it was insufficient to support an inference that any particular decisionmaker in McCleskey's case acted with discriminatory purpose. Without proof of discriminatory purpose specific to his case, reasoned the Court, a petitioner cannot prevail under the Equal Protection Clause. The Court admitted that there was "some risk" of racial prejudice influencing a jury's decision, but stated that it did not reach the level of an "unacceptable risk" in light of the importance of maintaining the discretionary nature of our criminal justice system. Id. at 297.

III. THE RACIAL JUSTICE ACT IS THE APPROPRIATE REMEDY FOR DISCRIMINATION IN CAPITAL SENTENCING

A. THE SUPREME COURT HAS STATED THAT THE REMEDY FOR DISCRIMINATION IN CAPITAL SENTENCING LIES WITH THE LEGISLATURE

The Supreme Court in *McCleskey,* after denying the petitioner relief, stated:

> McCleskey's arguments are best presented to the legislative bodies. * * * It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and

> "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. 481 U.S. at 319 (citations omitted.).

The Racial Justice Act is a legislative response to the Supreme Court's suggestion that the issues presented in the *McCleskey* case are more appropriately suited for legislative solutions.

B. THE RACIAL JUSTICE ACT WILL EFFECTIVELY REMEDY AND PROTECT AGAINST WIDESPREAD DISCRIMINATION IN DEATH PENALTY SENTENCING

The Racial Justice Act will enable claimants whose death sentences further an unexplained racially discriminatory pattern to have their sentences (but not their convictions) overturned. It will also encourage States to take action to eliminate any discrimination that may exist in their capital punishment systems.

The Racial Justice Act prohibits the imposition of the death penalty under State or Federal law if the sentence is part of a "racially discriminatory pattern." If a discriminatory pattern exists—if a defendant can establish that the race of defendants or victims is playing a role in sentencing—the the Government must show by clear and convincing evidence that the racial disparities are not the result of discrimination, but reflect nonracial factors, such as the presence or absence of mitigating or aggravating circumstances.

For example, if a defendant offers admissible statistical evidence demonstrating that blacks receive death sentences in a particular State at a rate higher than whites, and the defendant shows that the death sentence was imposed in furtherance of this racially discriminatory pattern, then the State must show by clear and convincing evidence that the statistical disparity results from other, nonracial factors, such as differences in the nature of the crimes or in the conviction records of the Defendants.

If the Government cannot meet that burden, the death sentence must be vacated. If we are serious about ending race discrimination in capital sentencing, no other result is acceptable.

By permitting statistical evidence of a pattern of racial disparties to be used to establish a claim of race discrimination, the act makes the standard of proof in capital sentencing cases analogous to that under other federal antidiscrimination laws. So, for example, the kinds of statistical evidence accepted by the Supreme Court in discriminatory venire-selection cases, and title VII cases, may establish such a pattern. See, e.g., *Castaneda* v. *Partida,* 430 U.S. 482 (1977); *Bazemore* v. *Friday,* 478 U.S. 385 (1986). Proof of discriminatory motive on the part of any individual or institution need not be shown.

Contrary to arguments made by opponents of the act, it will not result in quotas in death sentences. Under the act, the mere fact that blacks may receive the death penalty more frequently that whites would not even create a prima facie case of discrimination. To establish a prima facie case, a defendant must show that blacks, or killers of whites, for example, receive the death penalty with a frequency that is disproportionate to their representation among those arrested, or charged with, or convicted of death-eligible crimes under the bill. And even if a prima facie case is established, the Government can rebut such a claim by showing by clear and convincing evidence that any disparity is the result of nonracial factors. The act is simply intended to eliminate racism in capital sentencing. It would not create quotas of any kind.

In order to ensure that adequate data are available to determine whether or not race discrimination exists, the amendment also requires jurisdictions which have the death penalty to collect and maintain data about the nature of crimes for which the death penalty may be imposed, the details of those crimes, and the demographic characteristics of the victims and the defendants.

The Racial Justice Act is supported by a number of leading organizations, including the American Bar Association, the Leadership Conference on Civil Rights, and the National Association for the Advancement of Colored People.

IV. THE RACIAL JUSTICE ACT IS CONSTITUTIONAL

Section 5 of the 14th amendment grants Congress the power to enforce the constitutional guarantee of equal protection of the laws through "appropriate legislation." That section grants Congress broad remedial powers to determine what legislation is necessary to secure the equal protection guarantee of the 14th amendment.

The Supreme Court has held that under section 5, Congress may enact statutes designed to redress racial discrimination, even in the wake of Supreme Court decisions holding that such redress is not directly mandated by the Constitution. *Katzenback* v. *Morgan,* 384 U.S. 641 (1966) (upholding legislation suspending the use of literacy tests under the Voting Rights Act, despite the fact that the Court had determined such tests did not violate the Equal Protection Clause); See also *Oregon* v. *Mitchell,* 400 U.S. 112 (1970). As former Chief Justice Warren Burger wrote in *Fullilove* v. *Klutznick:*

> [I]n no organ of government, State or Federal, does there repose a more comprehensive remedial authority than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. 448 U.S. 448, 483 (1980).

And in her recent opinion in *Richmond* v. *Croson,* Justice O'Connor characterized Congress's authority in similarly expansive terms:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. 57 U.S.L.W. 4132, 4138 (U.S. January 23, 1989) (emphasis in original).

In *McCleskey* itself, the Supreme Court recognized that the evidence of widespread, systemic race discrimination in capital sentencing is "best presented to the legislative bodies." 481 U.S. at 319. After reviewing that evidence, we have concluded that the pattern of racial discrimination in capital sentencing contravenes the 14th amendment's equal protection guarantee. In these circumstances, Congress clearly has constitutional authority to fashion a remedy designed to wipe out that discrimination whereever it exists.

The Racial Justice Act is such a remedy. It is thus "appropriate legislation" within the meaning of section 5 of the 14th amendment. Note, Too Much Justice: A Legislative Response to *McCleskey* v. *Kemp,* 24 Harv. C.R.-C.L.L. Rev. 437 (1989). The committee received a memorandum prepared by the distinguished Washington law firm of Hogan & Hartson, which concludes that the act "is a constitutionally sound means by which Congress can seek to uncover and eliminate intentional discrimination from capital sentencing systems." (P. 5.)

It is abundantly clear that Congress has the constitutional authority to find that unexplained racial disparities in capital sentencing threaten the principle of constitutional equality and the Racial Justice Act is an appropriate means of enforcing the constitutional guarantee.

V. CONCLUSION

There is widespread and disturbing evidence of patterns of racial discrimination in the imposition of the death penalty in many jurisdictions. If the Congress is to live up to its responsibility to fulfill the Constitution's promise of equal protection of the laws, we must ensure that racial discrimination plays no role in the decision as to who shall live and who shall die. Legislation must be enacted in order to eliminate the significant risk that the race of the victim or the race of the defendant affects the outcome of capital sentencing decisions. The Racial Justice Act of 1989 would eliminate this risk and prevent discrimination in capital sentencing.

XI. ADDITIONAL VIEWS OF SENATORS LEAHY AND KENNEDY

The unchecked growth of violent crime in America has become a source of fear and alarm for all our people. One out of every four households in the United States is touched by serious crime.

We share a deep concern about this grim statistic for it does not tell the whole story of the suffering and anguish of the victims of violent crime.

However, we do not believe that the solution to the violent crime problem rests with the death penalty. We believe that it is wrong in principle, as a matter of public policy, and as a matter of constitutional law. Although proponents of the measure argue that it will decrease violent crime, we believe that it is a placebo which will divert public attention and resources away from those measures which have a chance of reducing the crime rate.

I. The Death Penalty Is Wrong as a Matter of Public Policy

First, capital punishment places incredible strains on our criminal justice system, far outweighing any marginal benefit that arguably is gained. The death penalty in our society is so controversial that it inevitably will be accompanied by the spectacle of shuffling a human being back and forth between death row and temporary reprive during months, and even years of delay while the appellate courts grapple with the enormity and irreversibility of the penalty and its implications for a nation espousing a reverence for human life. It is a divisive penalty that expends emotions and resources out of all proportion to any impact it could possibly have on the real problem of violent crime in the United States.

Second, imposition of the death penalty leaves no room for mistakes. No matter how well qualified the trial judges and well intenioned the juries, the criminal system is run by people, and people make mistakes. No matter what procedures are used to determine the appropriate cases for the ultimate penalty of capital punishment, innocent persons will be condemned to die.

A recent study published in the Stanford Law Review documented 350 cases in this century in which people later found to be innocent were convicted of potential capital crimes. 40 Stan. L. Rev. 21 (1987).

The response to this argument has been essentially that such risks are inevitable in our society. Possibly, this would be a convincing argument if the death penalty were the only option, if society's stability depended on the death penalty, as national security depends on a strong national defense. But the argument is self-serving. There has never been a demonstration that the death penalty is effective in reducing crime. Indeed, there is much evidence to the contrary. Since there are clear alternatives to the death penalty this argument fails utterly.

Third, support of capital punishment is a quick, shorthand method for appearing to be tough on crime. But an analysis of recent criminal justice statistics and crime rates demonstrates convincingly the fallacy that capital punishment can reduce the Nation's soaring violent crime rate. It is a substitute—an ineffective substitute—for the specific, modest, concrete steps that can be taken now to lower the crime rate.

With rare unanimity, the studies show no higher criminal homicide rates in States without the death penalty than in those which retain it. There is no indication that the death penalty, as imposed in various States, affects the rate of criminal homicide. It certainly does not affect the rate of violent crime, as it is targeted at only one percent of all violent crimes.

We believe that if the goal of the death penalty is deterrence, legislation imposing a real life sentence will more effective accomplish that goal without imposing the social costs of the death penalty. The very real and unavoidable prospect of spending one's entire life in prison with no hope for release—the prospect of life without freedom—is a chilling and haunting one. As effective retribution, it is to be compared to a sentence of death, and for many it is worse.

Fourth, this legislation does little to alleviate the fears of the American people caused by the increase in the number of robberies, muggings, burglaries and assaults. It is these crimes that the American people fear most. Whether or not one can be electrocuted for committing treason or espionage or attempting to assassinate a President is largely irrelevant to the problem of street crime in America. Instead, we should be looking at other solutions.

Fifth, as we explain in our views on the Racial Justice Act, the death penalty has been applied in a racially biased manner. The Racial Justice Act would ensure that the death penalty is not used to further a racially discriminatory pattern. We oppose the death penalty in all cases as a matter of principle, and we support the Racial Justice Act as a necessary improvement if the death penalty is going to be imposed.

II. The Death Penalty Is Wrong in Principle

The death penalty is the harshest punishment which can be inflicted. In our view, it is wrong in principle.

We believe that the act of premeditated execution is itself a debasing denial of the sanctity of life. This is aggravated by the fact that executions today still involve such barbaric suffering that as a matter of public policy, they are conducted in private. The late Senator Philip Hart, in opposing the death penalty in 1974, eloquently explained his concern about the brutality of the death penalty:

> As for the brutalizing effect of the death penalty, abolitionists are often accused of holding a double standard—concern for the sanctity of life when it comes to convicted murderers, but no equal reverence for the lives of the innocent victims. Such attacks are unfair. There is a valid distinction between killing when there is a clear and

> present danger than one would otherwise become an innoceant victim and society's right to punish criminals after the fact of their offense. If executions could bring back to life the innocent victims of criminal murder, or if the prospective victim can save his own life at the cost of killing his attacker, all people except the absolute pacifist would value the innocent life over the life of the murderer. But those are not the kinds of choices we face in passing death penalty statutes unless it is shown that they will protect innocent lives effectively when other punishments will not.

(See the additional views of Senator Philip Hart (Michigan) in the Committee Report to accompany S. 1401, S. Rept. No. 93-721, 93d Congress, 1st session 46 (1974)).

III. THIS DEATH PENALTY LEGISLATION MAY WELL BE UNCONSTITUTIONAL

Having stated briefly some of the reasons underlying our position that a Federal capital punishment bill should not be enacted, we wish to express opposition to the death penalty bill on constitutional grounds.

Although treason and espionage have historically been regarded as offenses for which the death penalty may be imposed, the Supreme Court decision in *Coker* v. *Georgia,* 433 U.S. 584 (1977) creates serious doubt as to the constitutionality of the provisions of this bill permitting the imposition of the death penalty for crimes where death does not result. The Court in *Coker* held that the death penalty could not be imposed for a rape in which death did not result. The rationale of that case is equally applicable to treason, espionage, and attempted assassinations of the President—all crimes where death does not result.

In conclusion, we believe that capital punishment is wrong in principle, wrong as public policy, and wrong as a matter of constitutional law.

XII. ADDITIONAL VIEWS OF SENATORS THURMOND, HATCH, SIMPSON, AND HUMPHREY

S. 32, "The Federal Death Penalty Act of 1989" establishes constitutional procedures for the implementation of the death penalty for certain Federal offenses. The bill, as introduced, complies with the constitutional procedures outlined by the Supreme Court and establishes the procedures for the implementation of the death penalty for the numerous Federal crimes that currently authorize a sentence of death and certain additional crimes. In fact, S. 32, prior to markup, was essentially the same bill which passed the Senate in February 1984 by a vote of 62 to 32.

We believe the death penalty is absolutely necessary. If violent individuals know the death penalty is a punishment alternative, many of them will be deterred from committing murder.

The lawabiding citizens of this Nation demand action on Federal death penalty legislation. A recent Gallup poll shows that public support for the death penalty is at the highest point recorded in more than half a century, with 79 percent favoring the death penalty for murder. We believe the American people deserve to have a death penalty which will deter violent action against them and will provide swift, appropriate punishment for individuals who choose to commit heinous crimes.

During markup of the bill, several amendments were added which severely weaken the bill, one of which will have the effect of making the death penalty impossible to implement. The most significant of these amendments were:

(1) an amendment which incorporates the Racial Justice Act into the bill;

(2) an amendment which categorically prohibits the execution of mentally retarded capital defendants; and

(3) an amendment prohibiting the execution of capital defendants for a crime committed at 16 or 17 years of age, no matter how heinous the offense.

The first amendment is a "killer amendment" and will effectively eliminate both Federal and State death penalties. The other amendments are not warranted, not required by the Constitution, and will make the death penalty difficult to impose. We opposed these amendments which weakened S. 32 and will address them separately.

1. Racial Quota Amendment

The most troubling amendment adopted by the committee was offered by Senator Kennedy and incorporated S. 1696, "The Racial Justice Act", into the bill. By a vote of 7-6, with one Senator not voting, the committee accepted Senator Kennedy's amendment which prohibits the death sentence in all State and Federal cases except where the Government can satisfy an unachievable standard of racial proportionality in the imposition of past death sentences. This amendment would effectively abolish both the State and Federal death penalties, is gravely flawed from the standpoints of law and policy, and, if applied as written, would require death sentences to be determined precisely on the basis of race. We strenuously oppose the racial proportionality amendment and, if it is not removed from the bill by the full Senate, and sound objectives of S. 32 will be completely undercut.

The stated justification for the racial proportionality amendment is the claim that the death penalty is applied in a manner that unconstitutionally discriminates against blacks. This precise argument was squarely rejected by the U.S. Supreme Court in the case of *McCleskey* v. *Kemp,* 481 U.S. 279 (1987). Justice Powell's majority opinion in the *McCleskey* case held that the question of whether a death sentence was unconstitutionally affected by discrimination must be decided by evaluating the fairness of the procedures applied in the particular case in question. The Court squarely rejected the argument that deviations from statistical parity in the imposition of past death sentences could provide a basis for invalidating a death sentence which complied with the meticulous and exacting requirements imposed by the Court's decisions.

Moreover, comprehensive official data on the racial breakdown of death sentences in the United States powerfully rebut the claim of discrimination against blacks. As shown by the Bureau of Justice Statistics' most recent report on capital punishment, 66.2 percent of those sentenced to death in 1988 were white (BJS Report, "Capital Punishment 1988," p. 7, table 5). At the same time, other official data indicates that whites constitute only 50 percent of those who commit murder (BJS, "Report to the Nation on Crime and Justice," March 1988, p. 47). In short, the percentage of whites sentenced to death exceeds the white percentage of the pool of potential recipients of the death sentence. This reconfirms earlier BJS data indicating that the probability of a white murderer receiving the death penalty is roughly 33 percent greater than in the case of a black murderer (BJS Report, "Capital Punishment 1984," pp. 6–8, tables 7, 12).

Thus, the constant repetition of the claim that American juries discriminate against blacks in imposing the death penalty is rebutted by the hard facts. Recognizing that the facts refute any claim that the death penalty discriminates against minority defendants, proponents of race-based sentencing argue that juries discriminate on the basis of the race of the victim. But this was the very theory rejected by the Supreme Court in the *McCleskey* case. And the only court which actually reviewed the validity of the so-called "Baldus Study"—which proponents of the racial amendment cite as their strongest proof of "victim-based discrimination"—flatly rejected that study as invalid and untrustworthy. *McCleskey* v. *Zant,* 580 F.Supp. 338, 354–65 (1984). Moreover, a more recent scholarly study of the racial sentencing patterns in 496 murder cases concluded that there was no evidence of discrimination based on the race of either the perpetrators or the victims (Klein, Abrahamse, and Rolph, "Relationship of Offender and Victim Race to Death Penalty Sentences in California").

The Kennedy amendment is not only flawed in its premise but imposes an unworkable and unconstitutional system of statistical sentencing. The bill prohibits any death sentence (State or Federal) which furthers any statistical imbalance in past death sentences covering any period the defendant may choose to select. As stated by Georgia's Deputy Attorney General William B. Hill, Jr., in his testimony before the committee,

> [B]y requiring that a criminal justice system not susceptible to mathematical predictability produce, nonetheless, mathematically predictable results, this Proposed Amendment does nothing more than abolish capital punishment.

Under the Kennedy amendment, the availability of the death penalty in a given case would squarely and conclusively depend on the race of the perpetrator or the race of the victim. For example, if the statisticians decided that too many killers of white victims were being sentenced to death in a given jurisdiction, the Kennedy amendment would prohibit the death sentence in cases where the victim was white but not if the victim was black. Consequently, a convicted murderer could conclusively avoid the death penalty by invoking the race of his victim. The cruel irony of such results for the innocent victims of brutal murders is difficult to exaggerate.

Conversely, if the statisticians decided that a disproportionate number of white perpetrators were receiving the death sentence—which could well be argued in light of the BJS statistics cited above—the Kennedy amendment would prohibit the death sentence in cases where the murderer was white; but it would allow the death sentence if the murderer was black. In short, race and statistics would become the controlling factor in the availability of the death sentence.

The constitutionality of such arrangements under the equal protection clause is highly doubtful, to say the least. The Supreme Court's death penalty decisions seek to minimize the role of race in capital sentencing. But the Kennedy amendment would make racial considerations paramount and conclusive, by its own terms.

Finally, the Kennedy amendment would set an extremely dangerous precedent for the entire criminal justice system. If capital sentencing can be required to conform to statistical theories of racial parity, there is no reason why the same statistical theories cannot be used to impose racial quotas on all criminal sentencing. Indeed, the theories underlying the Kennedy amendment logically require that the same requirements be imposed on all criminal sentencing. The requirement of statistical parity in criminal sentencing endorsed by the Kennedy amendment could ultimately lead to enormous chaos and disruption in our system of criminal sentencing.

The proper way to achieve the goal of a nondiscriminatory system of capital sentence is through adherence to the scrupulous requirements for fairness and due process currently required by the Supreme Court's extensive precedents on capital punishment. Moreover, S. 32, includes as a special precaution against discrimination by the jury which provides that in the sentencing phase, the jury shall be specifically instructed that it must not consider the defendant's or victim's race, color, national origin, religious beliefs, or sex. The jury must return to the court a certificate signed by each juror stating that consideration of these factors was not involved in his or her individual decision. Yet the Kennedy amendment is concerned solely with the statistical profile of past cases rather than the particular procedures followed in the case before the court. Indeed, the Kennedy amendment explicitly excludes any requirement for a showing of discriminatory motive or intent from the standards it proposes.

S. 32 was intended to restore the availability of the death penalty for those designated Federal crimes which are sufficiently serious to warrant the ultimate penalty. Instead, the Kennedy amendment would effectively abolish the enforceability of both the Federal death penalty and the death penalties adopted by some 37 States. Unless the Kennedy amendment is removed, the objectives of S. 32 will be completely undercut.

2. Mental Retardation

The committee passed an amendment offered by Senator Biden which categorically prohibits the execution of a capital defendant solely because he or she is mentally retarded. We opposed this amendment because the issue should not simply be one of whether a capital defendant is mentally retarded, but whether he understands the difference between right and wrong.

This issue was recently considered by the Supreme Court in the case of *Penry* v. *Lynaugh*, 109 S. Ct. 2934 (1989). In this case, the Court, when addressing the issue of imposing the death penalty on an individual who is mildly retarded, articulated a standard of whether the defendant knows the difference between right and wrong. The Court held that if a mentally retarded individual has the cognitive and moral capacity to act with the degree of culpability associated with the death penalty, it may be imposed.

Proponents of the categorical prohibition against the execution of mentally deficient capital murderers would have the Congress believe that the Supreme Court has authorized the execution of severely retarded individuals. This is not true. In fact, the Court noted that such retarded persons would not be convicted today since the modern insanity defense includes "mental defect" as part of the legal definition of insanity and prohibits the execution of persons who are unaware of their punishment and why they must suffer it. The Court concluded that it would be inappropriate to find that all mentally retarded people—by virtue of their mental retardation alone—inevitably lack the ability to understand the difference between right and wrong and conduct their actions accordingly.

Senator Thurmond offered a second degree amendment to the Biden amendment which embodied the holding of the Court in *Penry*. The effect of the Thurmond amendment would be to categorically prohibit the execution of those who are mentally retarded *and* are lacking in the ability to appreciate the wrongfulness of their actions. This amendment should be incorporated into the Biden amendment since it recognizes that severely retarded individuals who do not understand the difference between right and wrong would not be subject to the ultimate punishment. The Thurmond amendment protects the interest of persons who are mentally retarded while still recognized that the more Congress seeks to categorically take important decisions away from juries and give them to statisticians and psychologists, the more we throw into serious question the principles that underlie our criminal justice system.

3. Minimum Age of 18

In the case of *Stanford* v. *Kentucky,* 109 S. Ct. 2969 (1989), the Supreme Court held that imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age does not constitute cruel and unusual punishment. The committee passed a Biden amendment which reverses the Court and categorically prohibits the execution of capital defendants who commit capital offenses at age 16 or 17.

S. 32 does not mandate the death penalty be imposed on any person for any crime. It provides sufficient authority for the factfinder to decide against imposition of the death penalty. If the jury believes that an individual is not deserving of the death penalty due to his or her age, then it can recommend a lesser sentence.

The murders involved in the *Stanford* case were truly vicious and heinous. One of them involved a 17-year-old who abducted his victim, raped and sodomized her, and then shot her in the face and in the back of the head at point-blank range. In describing the crime, the defendant laughed about it. The perpetrator of a vicious act such as this should not be categorically insulated from the sanction of the death penalty simply because he or she committed the crime at age 16 to 17. We should not prohibit a jury's consideration of a death sentence in appropriate cases simply because the defendant is of such an age.

In closing, the death penalty is not a new issue to the Senate. In February 1984, the Senate passed a bill similar to S. 32 by a vote of 63 to 32. In addition, Congress enacted a death penalty for drug related cop killings and drug kingpin murderers last year. This action on the part of Congress was a valuable first step. However, we did not go far enough. it is time for Congress to broaden the category of offenses for which the death penalty should be applied and to enact the necessary procedures for the implementation of the death penalty. Yet, when Congress chooses to act on comprehensive death penalty legislation, it should take steps to ensure that the legislation can be effectively implemented. For Congress to pass cumbersome procedures which, in effect, can never be utilized would be a disservice to the American people.

XIII. ADDITIONAL VIEWS OF SENATOR GRASSLEY ON S. 32

As a matter of constitutional law, capital punishment is a presumably available remedy for the States and Federal Government. As a matter of criminal law policy, the death sentence should be available for those convicted of the most heinous crimes.

To advocate the use of society's ultimate criminal sanction is not something I take lightly. Of course, before imposition of this sanction, we must provide all appropriate and constitutional due process procedural safeguards. But, I believe that capital punishment should be a sentencing option for those crimes our people deem heinous and abominable. If after certain precribed procedures are followed to insure that mitigating and aggravating factors are taken into account, our Constitution permits society the right to end that criminal's life. Since 1976, the evidence is overwhelming that in the United States, the death sentence has been imposed with full and ample civil and constitutional rights being afforded to the convicted defendant.

I am an original cosponsor of S. 32 which would establish constitutional procedures for the possible imposition of the death sentence for certain heinous and abominable acts. The bill was introduced in January of this year by my distinguished colleague from South Carolina, Senator Thurmond.

In addition to establishing constitutional procedures for the imposition of the death penalty for crimes such as first degree murder, treason, and espionage, S. 32 also authorizes the death penalty for such crimes as certain attempts to assassinate the President; murder by a Federal prisoner serving a life-term; murder-for-hire in the aid of racketeering; hostage-taking situations that result in death; and genocide.

I believe that our preeminent responsibility is to protect the people. As elected respresentatives, we swear to uphold the Constitution by—among other things—insuring "domestic tranquility". The welfare of the people must always be our supreme law.

After much thought and study, I conclude that capital punishment remains an appropriate punishment for certain abominable offenses. The public supports the imposition of capital punishment in such circumstances because it is necessary, appropriate, and in certain circumstances the only just punishment. To attach a lesser sanction would, in my view, undermine our system of justice and its ability to deter crimes. Worse, it's an abdication of the Government's duty to protect its people.

However, due to the adoption of the "Racial Proportionality Act" and other weakening amendments, I voted against S. 32 on final passage.

Let there be no mistake: Enactment of the Racial Proportionality Act as part of S. 32 will abolish the death penalty. You cannot support the availability of capital punishment, while supporting the

"Racial Proportionality Act." This legislation will make it impossible for not only the Federal Government, but also the State Governments—including Ohio, Arizona, Alabama, Illinois, South Carolina, Utah, Wyoming, Pennsylvania, and New Hampshire—to impose the death penalty. All that the act's required statistics need show is that is certain percentage of all killers are members of a particular race or group—or—that a certain percentage of all victims of killers are members of a particular race or group—and that would be the end of the death penalty.

Proponents of the "Racial Proportionality Act" contend that killers of black victims do not receive the death senetence as often as the killers of white victims. Even if this is true, do the proponents rectify this alleged disparty by increasing the imposition of the death penalty for killers of black victims? No. Rather, they would write the death penalty out of existence no matter the race of the victim. What consolation is this is this to the families and friends of black murder victims? None.

Make no mistake: The exact aim of this act is to eliminate the death penalty as a possible sanction against criminals convicted of the most heinous and abominable crimes. Worse, it cynically ignores the present safeguards in our criminal law.

In our system of justice, computers do not hand down sentences. So there is no role for statisticians or social scientists in the courtroom. Rather, for more than 200 years, our system has dispensed justice through the efforts of prosecutors, judges, and juries. They take an oath to serve the ends of justice. Lady Justice—unlike the social scientists—is blind. She dispenses justice without regard to color, race, religion, gender, or national origin. Lady Justice hears only the facts of the case. She serves the facts—not some political agenda.

The Congress cannot exercise discretion for prosecutors, judges, and juries. And, prosecutors and judges cannot decide for juries,—based on some arbitrary racial quota—who is to receive the death penalty and who is not. Current law does allow for juries to be required to sign affidavits that they have not discriminated in their sentencing. And, sentences can be, and are, overturned if actual discrimination during any portion of the trial deliberations can be proved by the defendant.

The Supreme Court said in McCleskey that:

> A defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this is that a criminal defendant must provide that the purposeful discrimination "had a discriminary effect" on him. Thus, to prevail under the equal protection clause, *McCleskey* must prove that the decisionmakers in his case acted with discriminatory purpose.

Yet, the proposed "Racial Proportionality Act"—in total disregard of accepted principles of equal protection jurisprudence—imposes no burden on a criminal defendant in a capital case, nor a petitioner in collateral proceedings, "To show discriminatory motive, intent or purpose on the part of any individual or institution."

In testimony before our committee, William B. Hill, Jr.—the deputy attorney general of Georgia—stated:

> The inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and *uniquely human judgments* that *defy codification* and that build *discretion, equity,* and *flexibility* into a legal system.

The proposed "Racial Proportionality Act" is completely contrary to our criminal sentencing system. All that is required to establish discriminatory impact, is proof of nothing more than the acknowledged fact that as a result of unique human judgments that defy codification, a jury's collective sentencing judgment lacks mathematical predictability. Under such a minimal burden, a defendant is guaranteed a ready-made prima facie case; however, the presentation of a successful rebuttal case by the Government would be virtually impossible. Prosecutors would be required to reproduce and present evidence sufficient to explain the "race neutral" factors that motivated jurors to return sentences of death in cases tried in other States, by other U.S. attorneys and district attorneys, respectively.

Even if such factors could be produced in rebuttal, only by examination of individual jurors regarding their mental processes and emotional reactions could it ever be known what race neutral factors were actually relied upon by the jurors. Only then could proof of these relevant race neutral factors serve to "persuasively explain" any observable racial disparity. The Government would also have to present proof of lack of discriminatory intent and purpose on the part of every decisionmaker involved in the capital sentencing process: Prosecutors, grand jurors, trial and appellate court judges, and legislators. All this is calculated to shift the judicial focus away from individual criminal defendants.

Instead of determining whether the defendant received due process safeguards, the proposed act engages in diversionary tactics:

(1) It shifts the focus to the government on a system-wide basis;

(2) It guarantees a prima facie case against execution for any capital defendant; and

(3) It requires the criminal justice system to produce mathematically predictable results.

The result of amending the "Racial Proportionality Act" onto S. 32 is the abolition of the death penalty. I appreciate that this is the true goal of the proponents of the "Racial Proportionality Act". But we should not and we cannot insure a statistically exact proportion of black and white defendants receiving the death penalty. Such a statutorily compelled course of conduct is not only contrary to current law, it runs counter to hundreds of years of Anglo-American jurisprudence, because it is grounded in the proposition that courts and juries have less value for the lives of members of one race, or another.

For these reasons, and even though I am a strong supporter of the death penalty, I cannot support S. 32 as amended by the committee.

XIV. ADDITIONAL VIEWS OF SENATOR SPECTER

I wish to set forth my views regarding S. 32, legislation to establish procedures for implementation of a Federal death penalty as amended by the Judiciary Committee on October 17, 1989, S. 32 closely parallels S. 36, legislation that I introduced to establish constitutional procedures for the imposition of the sentence of death in Federal criminal cases and to create additional capital offenses.

If we are to retain the death penalty, we must be meticulously careful with respect to the standards and procedures for its application.

I believe that several committee amendments enhanced this bill with respect to its meeting constitutional guidelines. First, the bill was amended to require a jury instruction to protect against a verdict based on race or prejudice, a provision included in S. 36. Second, the bill was amended to prohibit execution of persons under the age of 18 years. The bill also was amended to prohibit execution of mentally retarded persons, and to provide certain protections against imposing the penalty in a racially discriminatory manner. I believe that these are sound revisions which are necessary to bring about implementation of the currently invalid death penalty statutes.

It is my sense that this legislation is long overdue. The various Federal offenses which include a capital penalty have not met constitutional muster since the Supreme Court squarely addressed this issue in *Furman* v. *Georgia,* in 1972. This body had not responded to the High Court's ruling and I believe now is the time to do so. There are various Federal statutes which include capital crimes. These offenses include treason, assassination of the President, murder and air piracy and cover other offenses where existing Federal law calls for the death penalty, but procedures have not been updated to accommodate decisions by the Supreme Court of the United States since 1972.

A complete revision of the Federal Criminal Code to provide for the death penalty in appropriate circumstances must meet the constitutional guidelines set forth by the Supreme Court. In *Furman* v. *Georgia,* the Court did not conclude that capital punishment is unconstitutional, but only the procedures of the Georgia statute were constitutionally invalid because it provided unguided discretion to the factfinder. Other States' statutes were similar to Georgia's and the ultimate effect of the Court's decision was in invalidation of most capital punishment statutes throughout the country. However, 37 States and Congress have reenacted capital punishment statutes in accordance with the procedures articulated by the Court. In fact, in 1976, *Gregg* v. *Georgia,* 428 U.S. 153, the Court again reviewed the constitutionality of capital punishment and upheld Georgia's revised death penalty law.

Since that time, procedures promulgated by the States have continually met constitutional muster. Some have argued, however, including members of the Supreme Court, that capital punishment itself is unconstitutional. My reading of the constitution results in a different conclusion. There are numerous instances in the Constitution of the United States which specifically recognizes and permits capital punishment. For example, the fifth amendment specifies that "no person shall be held to answer for a capital * * * crime unless on a presentment or indictment of a Grand Jury * * *"; the fifth amendment also provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb * * *; and that no person shall "be deprived of life, liberty or property without due process of law * * * "

Moreover, in 1953, Chief Justice Warren wrote:

> At the outset let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever, the arguments may be against capital punishment both on moral grounds and in terms of accomplishing the purpose of punishment, and they are forceful, the death penalty has been employed throughout our history and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty—*Trop* v. *Dulles*, 356 U.S. 86, 99 (Dicta) (1958).

In addition to the legal underpinnings of the Court's conclusion that capital punishment is constitutional, there also was some consideration of the general sentiment throughout the country in support of the death penalty:

> Despite the continuing debate, dating back to the 19th Century over the morality and utility of capital punishment it is now evident that a large portion of American society continues to regard it as an appropriate and necessary criminal sanction.
>
> The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislators of at least 35 states have enacted new statutes to provide for the death penalty for at least some crimes that results in the death of another person. The United States Congress in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. * * * But all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people." *Gregg* v. *Georgia*, 428 U.S. at 179–81.

Significantly, opinion polls—while not of legal significance—nonetheless support the Court's conclusion that there is "a marked indication of society's endorsement of the death penalty." A 1986 poll concluded that 70 percent favored the penalty with 22 percent in opposition and 8 percent with no opinion.

Consequently, with requisite procedural protections, capital punishment is an appropriate and supportable penalty.

XV. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 604 as reported are as follows: Existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

CHAPTER 2—AIRCRAFT AND MOTOR VEHICLES

*   *   *   *   *   *   *

§ 34. Penalty when death results

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for [life, if the jury shall in its descretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.] *life.*

*   *   *   *   *   *   *

CHAPTER 37—ESPIONAGE AND CENSORSHIP

*   *   *   *   *   *   *

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for [life.] *life, except* *that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans, communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.*

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CHAPTER 40—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIAL

§844. Penalties

* * * * * * *

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined more than $10,000, or both; and if personal injury results to any person including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results to any person including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

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CHAPTER 50A—GENOCIDE

§ 1091. Genocide

(a) BASIC OFFENSE.—* * *

(b) PUNISHMENT FOR BASIC OFFENSE.—The punishment for an offense under subsection (a) is—

(1) in the case of an offense under subsection (a)(1), [a fine of not more than $1,000,000 and imprisonment for life;] *where death results, a fine of not more than $1,000,000 or imprisonment for life or a sentence of death;* and

(2) a fine of not more than $1,000,000 or imprisonment for not more than twenty years, or both, in any other case.

* * * * * * *

CHAPTER 51—HOMICIDE

§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpretration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premediated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree[,] shall [suffer death unless the jury qualifies its verdict by adding thereto without capital punishment" in which event he shall be sentenced to imprisonment for life;] *be punished by death or by imprisonment for life;*

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

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§1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that [any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and] any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

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CHAPTER 55--KIDNAPING

§1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(36) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(36));

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties,

shall be punished by imprisonment for any term of years of for [life.] *life and, if the death of any person results, shall be punished by death or life imprisonment.*

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§1203. Hostage taking

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for [life.] *life and, if the death of any person results, shall be punished by death or life imprisonment.*

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CHAPTER 83—POSTAL SERVICE

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§ 1716. Injurious articles as nonmailable

(a) All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, reptiles, and all explosives, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artifical articles, compositions, or material which may kill or injure another, or injure the mails or other property, whether or not sealed as first-class matter, are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any officer or employee of the Postal Service.

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(i)(1) Any ballistic knife be subject to the same restrictions and penalties provided under subsection (g) for knives described in the first sentence of that subsection.

(2) As used in this subsection, the term "ballistic knife" means a knife with a detachable blade that is propelled by a spring-operated mechanism.

* * * * * * *

Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for [life if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion, shall so order.] *life.*

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CHAPTER 84—PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPING AND ASSAULT

§ 1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties

(a) * * *

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(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished *(1)* by imprisonment for any term of years or for [life.] *life, or (2) by death or imprisonment for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.*

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CHAPTER 95—RACKETEERING

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§ 1958. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; [and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both] *and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000 or both.*

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§ 1959. Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

[(1) for murder or kidnaping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both;]

(1) for murder, by death or life imprisonment, or a fine of not more than $250,000, or both; and for kidnaping, by imprisonment for any term of years or for life, or a fine of not more than $250,000 or both.

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CHAPTER 97—RAILROADS

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§ 1992. Wrecking trains

Whoever willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce by any railroad; or

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Whoever is convicted of any such crime, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for [life if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order.] *life.*

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CHAPTER 103—ROBBERY AND BURGLARY

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§ 2113. Bank robbery and incidental crimes

(a) * * *

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(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years [or punished by death if the verdict of the jury shall so direct.] *or if death results shall be punished by death or life imprisonment.*

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CHAPTER 228—DEATH SENTENCE

Sec.

3591. Sentence of death.
3592. Factors to be considered in determining whether a sentence of death is justified.
3593. Special hearing to determine whether a sentence of death is justified.
3594. Imposition of a sentence of death.
3595. Review of a sentence of death.
3596. Implementation of a sentence of death.
3597. Use of State facilities.

§ 3591. Sentence of death

A defendant who has been found guilty of—

(a) an offense described in section 794 or section 2381 of this title;

(b) an offense described in section 1751(c) of this title, if the offense, as determined beyond a reasonable doubt at the hearing under section 3593, constitutes an attempt to kill the President of the United States and results in bodily injury to the President or comes dangerously close to causing the death of the President; or

(c) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

(1) intentionally killed the victim;

(2) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(3) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(4) intentionally and specifically engaged in an act, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified; provided that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

§ 3592. Factors to be considered in determining whether a sentence of death is justified

(a) Mitigating Factors.—In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of title 18 of the United States Code) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(b) Aggravating Factors for Espionage and Treason.—In determining whether a sentence of death is justified for an offense described in section 3591(a), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine whether, if any, exist:

(1) the defendant has previously been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and

(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

(c) AGGRAVATING FACTORS FOR HOMICIDE AND FOR ATTEMPTED MURDER OF THE PRESIDENT.—In determining whether a sentence of death is justified for an offense described in section 3591 (b) or (c), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

(1) the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property in interstate commerce by explosives), section 1118 (prisoners serving life term), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i) or (n)) (aircraft piracy);

(2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

(3) the defendant has previously been convicted of two or more Federal or State offenses, punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person;

(4) the defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

(8) the defendant committed the offense after planning and premediation to cause the death of a person or commit an act of terrorism;

(9) the defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment

of more than one year, committed on different occasions, involving the distribution of a controlled substance;

(10) the victim was particularly vulnerable due to old age, youth, or infirmity;

(11) the defendant had previously been convicted of violating title II or title III of the Controlled Substances Act for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise;

(12) the defendant violated section 408(c) of the Controlled Substances Act to the extent that the conduct described in section 408(c) of such Act was a violation of section 405 of such Act; or

(13) the defendant committed the offense against—

(A) the President of the United States, the President-elect, the Vice President, the Vice-President-elect, the Vice-President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A) of this title, if he is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

(i) while he is engaged in the performance of his official duties;

(ii) because of the performance of his official duties; or

(iii) because of his status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

§ 3593. Special hearing to determine whether a sentence of death is justified

(a) NOTICE BY THE GOVERNMENT.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice—

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) HEARING BEFORE A COURT OR JURY.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section; reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under seciton 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is

established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) RETURN OF SPECIAL FINDING.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by one or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH.—If, in the case of—

(1) an offense described in section 3591(a), an aggravating factor required to be considered under section 3592(b) is found to exist; or

(2) an offense described in section 3591 (b) or (c), an aggravating factor required to be considered under section 3592(c) is found to exist;

the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether a sentence of death shall be imposed rather than some other lesser sentence. The jury or the court, if there is no jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence, and the jury shall be so instructed.

(f) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, reli-

gious beliefs, national origin, or sex of the defendant or any victim may be.

§ 3594. Imposition of a sentence of death

Upon a finding under section 3593(e) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under section 3593(e) that a sentence of death is not justified, or under section 3593(d) that no aggravating factor required to be found exists, the court shall impose any sentence other than death that is authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without parole.

§ 3595. Review of a sentence of death

(a) APPEAL.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) REVIEW.—The court of appeals shall review the entire record in the case, including—

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) DECISION AND DISPOSITION.—

(1) If the court of appeals determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of an aggravating factor required to be considered under section 3592;

it shall affirm the sentence.

(2) In any other case, the court of appeals shall remand the case for reconsideration under section 3593.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

§ 3596. Implementation of a sentence of death

(a) A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State,

the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

§ 3597. Use of State facilities

(a) In General.—A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

(b) Excuse of an Employee on Moral or Religious Grounds.—No employee of any State department of corrections or the Federal Bureau of Prisons and employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

TITLE 49—TRANSPORTATION

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CHAPTER 20—PENALTIES

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§ 1473. Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties

(a) * * *

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(b)(1) * * *

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(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law.

[(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 1472(i) or 1472(n) of this title only if a hearing is held in accordance with this subsection.

[(2) When a defendant is found guilty of or pleads to an offense under section 1472(i) or 1472(n) of this title for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

[(A) before the jury which determined the defendant's guilt;

[(B) before a jury impaneled for the purpose of the hearing if—

[(i) the defendant was convicted upon a plea of guilty;

[(ii) the defendant was convicted after a trial before the court sitting without a jury; or

[(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

[(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

[(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

[(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraph (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7):

[(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

[(6) The court shall not impose the sentence of death on the defendant if the jury or, if there shall is no jury, the court finds by a special verdict as provided in paragraph (4) that at the time of the offense—

[(A) he was under the age of eighteen;

[(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

[(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

[(D) he was a principal (as defined in section 2(a) of Title 18) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

[(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted was cause, or would create a grave risk of causing death to another person.

[(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

[(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

[(B) the death of another person resulted from the commission or attempted commission of the offense, and—

[(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was impossible;

[(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;

[(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or [(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.]

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